

# Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy

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## I. INTRODUCTION

In the avalanche of state and local immigration-related lawmaking in recent years, few initiatives have stirred passions like those involving the police.<sup>1</sup> Take, for example, the charged disputes over Arizona's S.B. 1070, whose most controversial provision requires state and local police to ascertain the immigration status of individuals they encounter and share that information with federal authorities.<sup>2</sup> Even by the heated standards of discourse on immigration, clashes over S.B. 1070 have been fierce. Advocates of tougher enforcement have embraced the Arizona law and successfully urged other jurisdictions to adopt copycat laws.<sup>3</sup> At the same time, civil rights and community-based advocates have vigorously objected that S.B. 1070 and similar laws enable racial profiling, improper arrests, and violations of due process, and drive wedges between local police and immigrant communities.<sup>4</sup>

The Obama Administration swiftly joined the fray by filing suit to challenge S.B. 1070, arguing not that the law offended equal protection, due process, or Fourth Amendment principles—as civil rights advocates urged in their own lawsuits—but rather that it was preempted by federal law.<sup>5</sup> The district court enjoined four of the law's many provisions, and in *Arizona v. United States*, the Supreme Court largely agreed with the Obama Administration's position, facially invalidating all but one of the disputed provisions and cautioning that the final provision remained vulnerable to as applied challenges.<sup>6</sup>

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<sup>1</sup> See Monica W. Varsanyi, *Immigration Policy Activism in U.S. States and Cities: Interdisciplinary Perspectives*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 1, 3–4 (Monica Varsanyi ed., 2010); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2055–65 (2008). For typologies of subfederal immigration laws, see Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1158–60 (2008); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 805–06 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 592–93 (2008); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1642–49 (2008).

<sup>2</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 63–65 (2010).

<sup>3</sup> Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253–56 (2011).

<sup>4</sup> Kyrsten Sinema, *No Surprises: The Evolution of Anti-Immigration Legislation in Arizona*, in *PUNISHING IMMIGRANTS: POLICY, POLITICS, AND INJUSTICE* 62, 71 (Charis E. Kubrin, Marjorie S. Zatz & Ramiro Martínez, Jr. eds., 2012); Melissa Keaney & Alvaro M. Huerta, *Restrictionist States Rebuked: How Arizona v. United States Reins in States on Immigration*, 3 WAKE FOREST J.L. & POL'Y 249, 257 (2013).

<sup>5</sup> Keaney & Huerta, *supra* note 4, at 258–59; Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729–46 (2010).

<sup>6</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012); Chin & Miller, *supra* note 3, at 258–59.

While *Arizona* has been widely interpreted as putting the brakes on state and local immigration regulation, it hardly brings state and local involvement in immigration law and policy to an end.<sup>7</sup> With respect to immigration policing, in particular, while the Court brushed back the state's *unilateral* attempts to regulate and enforce immigration law, it simultaneously gave a boost to state and local immigration policing under the aegis of *federal* initiatives that enlist state and local cooperation.<sup>8</sup> Running counter to a conventional narrative of federal inaction on immigration control, the steady expansion of these federal arrangements in recent decades has contributed to an enduring convergence of immigration control and criminal law enforcement and the removal of unprecedented numbers of individuals.<sup>9</sup> The long shadow cast by mass immigration enforcement has integrated the principles, priorities, and procedures of immigration control into the day-to-day practices of many state and local police and criminal justice institutions to a considerable extent.<sup>10</sup>

Those federal programs are now undergoing a sea change with the deployment of technology. For example, even as it forcefully has urged

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<sup>7</sup> Compare David A. Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41, 41–42 (2012), [http://www.virginialawreview.org/inbrief/2012/04/14/Martin\\_Web.pdf](http://www.virginialawreview.org/inbrief/2012/04/14/Martin_Web.pdf) (characterizing *Arizona* as having “strongly endorsed [federal] primacy . . . in immigration control”), and Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1, 2 (2013) (describing *Arizona* as “a rebuke to sweeping state immigration power”), with Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 580 (2012) (arguing that *Arizona* “effectively green-lighted systematic state and local participation in immigration enforcement”). See also Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013) (arguing that *Arizona* leaves room for inclusionary state and local policies aimed at protecting and integrating noncitizens); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1787–90 (2010) (discussing ways in which federal immigration authorities’ extensive need for assistance from state and local law enforcement agencies gives those agencies leverage to influence federal immigration enforcement policies and practices).

<sup>8</sup> I use the term “immigration policing” to refer to the subset of direct immigration enforcement activities—which are activities involving determination of immigration status for purposes of immigration regulation itself, rather than ostensibly to advance other policy objectives—that are undertaken by federal, state, and local law enforcement officials. See Kalhan, *supra* note 1, at 1158–60 (distinguishing between direct and indirect immigration enforcement initiatives).

<sup>9</sup> DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 7 (2013); see Kalhan, *supra* note 1, at 1150–57; Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1128 (2013), available at <http://ssrn.com/abstract=2316336>; David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 178–81 (2012). Since 1986, the annual number of formal removals has skyrocketed from 25,000 to over 391,000 individuals. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 112 (2012).

<sup>10</sup> Eagly, *supra* note 9, at 1129; Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1419–20 (2011); Eagly, *supra* note 7, at 1777–78.

invalidation of S.B. 1070 and similar laws, the Obama Administration has presided over the largest expansion of state and local immigration policing in U.S. history with its implementation of the “Secure Communities” program. Secure Communities integrates the criminal records databases maintained by states and the FBI, which are routinely queried by police conducting background checks on individuals they arrest, with the immigration databases maintained by the Department of Homeland Security (DHS)—thereby automating DHS’s ability to identify potentially deportable noncitizens in state or local custody.<sup>11</sup> The program has transformative aspirations: to automatically determine the immigration status of every person nationwide who is arrested and booked by state and local police in order to identify potential immigration law violators.<sup>12</sup>

Secure Communities illustrates a broader, technology-based shift toward what I refer to as *automated immigration policing*. Automated immigration policing initiatives deploy interoperable database systems and other technologies to automate and routinize the identification and apprehension of potentially deportable noncitizens in the course of ordinary law enforcement encounters and other moments of day-to-day life.<sup>13</sup> While scholars and advocates have devoted critical attention to these programs, the full significance of this shift remains underappreciated. Observers primarily have analyzed these initiatives as extensions, in degree, of previous federal efforts to enlist state and local police assistance, emphasizing analogous questions, costs, and benefits.<sup>14</sup>

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<sup>11</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED* 9 (2012) [hereinafter GAO, *SECURE COMMUNITIES*].

<sup>12</sup> Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013); James Verini, *Obama’s Deportation Two Step*, WASH. MONTHLY TEN MILES SQUARE (June 27, 2012, 9:40 AM), [http://www.washingtonmonthly.com/ten-miles-square/2012/06/obamas\\_deportation\\_two\\_step038212.php](http://www.washingtonmonthly.com/ten-miles-square/2012/06/obamas_deportation_two_step038212.php); María Inés Zamudio, *The Allure of Secure*, CHI. REP., Nov.–Dec. 2011, at 12.

<sup>13</sup> Cf. Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1259 (2008) (analyzing issues arising from onset of the “automated administrative state”); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1325 (2008) (arguing that “the preventive state has become a technological one”).

<sup>14</sup> E.g., Eagly, *supra* note 9 (manuscript at 105); Chacón, *supra* note 7, at 603–06; Cox & Miles, *supra* note 12, at 93; Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819, 1850–58 (2011); MEISSNER ET AL., *supra* note 9, at 107–12; MICHELE WASLIN, IMMIGRATION POLICY CTR., *THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS* 7–18 (2011); NAT’L DAY LABORER ORGANIZING NETWORK ET AL., *RESTORING COMMUNITY: A NATIONAL COMMUNITY ADVISORY REPORT ON ICE’S FAILED “SECURE COMMUNITIES” PROGRAM* (2011); AARTI KOHLI ET AL., *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* (2011); NAT’L IMMIGRATION LAW CTR., *DHS’S “SECURE COMMUNITIES”: NO RULES OF THE ROAD* (2011) [hereinafter NILC], <http://www.nilc.org/scomm-no-rules-of-road-2011-03-04.html>; EDGAR AGUILASOCHO ET AL., *MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY* (2012); Kavitha Rajagopalan, *Deportation Program*

In this Article, I take a complementary but different approach. Automated immigration policing does not simply effect a massive increase in the number of state and local law enforcement officials involved in immigration policing—although as I discuss, it certainly does that, on an enormous scale. More fundamentally, as a leading edge of what I conceptualize elsewhere as an emerging surveillance regime, automated immigration policing contributes to a broader transformation in kind that renders immigration status visible, accessible, and salient in more legal and social domains than ever before, and subject to routine monitoring and screening by a wide range of public and private actors.<sup>15</sup> By using technology to make determinations of immigration status and the collection, storage, and dissemination of personal information for immigration enforcement purposes automatic, widespread, and continuous, automated immigration policing effects a basic shift in the nature of both “immigration federalism” and ordinary law enforcement activities.<sup>16</sup> As such, the implementation of these new initiatives raises questions analogous to those arising from other forms of technology-based surveillance and dataveillance that “monitor[] people in order to regulate and govern their behavior.”<sup>17</sup>

Accordingly, I assess automated immigration policing in the context of the emergence of this nascent immigration surveillance state, drawing upon technology-, surveillance-, and privacy-based frameworks to complement and refract the insights of existing analyses. In Part II, I recount the evolution of state and local immigration policing in recent decades, from which an

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*Net Cast Too Wide*, *NEWSDAY*, June 23, 2011, at A34, available at <http://www.newsday.com/news/rajagopalan-deportation-net-cast-too-wide-1.2980302>.

<sup>15</sup> Anil Kalhan, *Immigration Surveillance* (unpublished manuscript) (on file with author); see also JENNIFER LYNCH, IMMIGRATION POLICY CTR. & ELEC. FRONTIER FOUND., FROM FINGERPRINTS TO DNA: BIOMETRIC DATA COLLECTION IN U.S. IMMIGRANT COMMUNITIES AND BEYOND (2012) (discussing implications of expanded collection of biometrics and use of interoperable biometrics databases in immigration enforcement); MEISSNER ET AL., *supra* note 9, at 66 (“Database screening now accompanies virtually all key interactions between noncitizens and the federal government.”); Kalhan, *supra* note 1, at 1165–68 (discussing manner in which expansion of interior immigration enforcement has increased the salience and visibility of immigration status in society).

<sup>16</sup> Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (conceptualizing “immigration federalism” to refer to the “role [that] states and localities [should] play in making and implementing law and policy relating to immigration and immigrants”); see also Peter J. Spiro, *Federalism and Immigration: Models and Trends*, 53 INT’L SOC. SCI. J. 67 (2001).

<sup>17</sup> JOHN GILLIOM & TORIN MONAHAN, SUPERVISION: AN INTRODUCTION TO THE SURVEILLANCE SOCIETY 2 (2013) (conceptualizing surveillance as involving “the systematic monitoring, gathering, and analysis of information in order to make decisions, minimize risk, sort populations, and exercise power”); see also DAVID LYON, SURVEILLANCE STUDIES: AN OVERVIEW 14 (2007) (defining surveillance as the “focused, systematic, and routine attention to personal details for purposes of influence, management, protection, or direction”); Roger A. Clarke, *Information Technology and Dataveillance*, 31 COMM. ACM 498, 499 (1988) (conceptualizing “dataveillance” as “the systematic use of personal data systems in the investigation or monitoring of the actions . . . of one or more persons”).

equilibrium has been emerging that—perhaps ironically, given *Arizona*'s strong endorsement of federal power—contemplates considerable enmeshment of state and local police with immigration control under federal auspices, but with room for voluntary state and local choices along the cooperation–noncooperation spectrum. In Part III, I examine the federal government's two recent automated immigration policing initiatives—Secure Communities and the National Crime Information Center's Immigration Violators File—and show how the architecture of these programs disrupts that nascent equilibrium by curtailing state and local choices concerning the nature and extent of their participation in immigration policing. Instead, both initiatives make immigration status determinations by law enforcement automatic, pervasive, and effectively mandatory. In the process, these initiatives also blur the substantive lines between immigration control and other regulatory domains and the institutional lines between federal, state, and local agencies and departments.

Because they intersect with and share continuities with a broader, longer term set of developments concerning technology, surveillance, and information sharing, in Part IV I situate and analyze automated immigration policing within that wider context, addressing the surveillance- and privacy-related problems that these initiatives present.<sup>18</sup> While automated immigration policing initiatives can facilitate the efficient identification of large numbers of potentially deportable noncitizens, they also carry several categories of costs—all of which are exacerbated by the heightened vulnerabilities of noncitizens and the limited procedural protections afforded in immigration removal proceedings. These costs arise from the inherent fallibilities of automation, the tendency of surveillance mechanisms to be used for purposes beyond those for which they were initially implemented, the displacement of state and local control over information that states and localities collect and share with federal authorities, and the everyday effects of these initiatives on both law enforcement agencies and the communities being monitored. Finally, in Part V, I identify and advance principles to constrain, inform, and guide the implementation of automated immigration policing initiatives and other programs that similarly are reshaping immigration enforcement practices with the use of new technologies. As with other forms of technology-based surveillance, the expanded use of automated immigration policing demands greater attention to the interests at stake when personal information is collected for immigration enforcement purposes. I argue that the existing potential for conflicts over control of information between federal and subfederal governments may help to protect those interests, and that the importance of those interests demands improved transparency, oversight, and accountability in the implementation of automated immigration policing

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<sup>18</sup> See generally Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 484–91 (2006); Kevin D. Haggerty & Minas Samatas, *Surveillance and Democracy: An Unsettled Relationship*, in SURVEILLANCE AND DEMOCRACY 1 (Kevin D. Haggerty & Minas Samatas eds., 2010); GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 206–33 (1988); Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008).

mechanisms and other technology-based initiatives that are contributing to the development of the immigration surveillance state.

## II. THE EVOLUTION OF STATE AND LOCAL IMMIGRATION POLICING

In this Part, I recount and assess the evolution of state and local immigration in recent decades. First, I discuss the immigration policing initiatives unilaterally adopted in recent years by states and localities, which, both doctrinally and politically, have shaped the federal government's comparatively less visible but more consequential efforts since the 1980s to enlist state and local police participation in immigration enforcement. Second, I outline and review the expansion of those federal initiatives. Finally, I assess the equilibrium on immigration federalism that has been emerging from these developments, which has contemplated considerable state and local immigration policing under federal coordination and supervision, but also has afforded states and localities space to make voluntary choices about the extent to which they wish to undertake or limit their involvement in immigration policing.

### A. *Unilateral State and Local Initiatives*

Throughout most of the twentieth century, unilateral state and local enforcement of immigration law remained limited. While immigration policy principally was implemented through several categories of state and local law for much of the nineteenth century—including laws restricting migration on grounds relating to crime, health, race, poverty, and disability—states and localities only episodically continued to attempt to regulate immigration unilaterally after Congress began to construct a comprehensive federal immigration law framework in the late nineteenth century.<sup>19</sup> In fact, whether state and local police have authority to enforce federal immigration law at all has long been questioned.<sup>20</sup> The longstanding position of the Department of Justice was that state and local police lacked authority “to arrest or detain aliens

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<sup>19</sup> Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–84 (1993); Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1359–60 (2013).

<sup>20</sup> Jeff Lewis, J.J. Gass, Amelie von Briesen, Howard Master & Michael Wishnie, *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER'S IMMIGR. BULL. 944, 945 (2002). Federal immigration law consists of both civil provisions authorizing removal, fines, and other civil penalties and criminal provisions authorizing incarceration and other forms of punishment. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137–39 (2009); Cecilia Renn, *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. MIAMI L. REV. 999, 1003–04 (1987). Congress has expressly authorized state and local police to make arrests for some immigration-related crimes. 8 U.S.C. § 1252c(a) (2012) (authorizing criminal arrests for harboring, smuggling, or transporting unauthorized immigrants); *id.* § 1324(c) (authorizing criminal arrests for illegal reentry by previously deported felons).

solely for purposes of civil deportation proceedings as opposed to criminal prosecution,” and while courts did not resolve the issue definitively, commentators and state and local officials reached the same conclusion.<sup>21</sup>

In recent years, however, a growing number of jurisdictions—propelled by the convergence between immigration and crime control in public and legal discourse<sup>22</sup>—have challenged this equilibrium from below by unilaterally seeking to involve their law enforcement agencies in immigration policing more systematically. While the recent flood of state and local immigration-related lawmaking has by no means pointed exclusively in the direction of greater enforcement,<sup>23</sup> the push to expand immigration policing in some jurisdictions has been powerful. In 1994, California voters approved Proposition 187, which—in addition to barring unauthorized immigrants from public benefits and services—required all law enforcement officials within the state to ascertain the immigration status of arrestees whom they suspected of being unlawfully present within the United States and to share that information and otherwise cooperate with federal officials.<sup>24</sup> While eventually enjoined as preempted, the initiative proved influential in shaping national debates.<sup>25</sup>

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<sup>21</sup> Memorandum from Teresa Wynn Roseborough, Dep. Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, *Assistance by State and Local Police in Apprehending Illegal Aliens*, 20 Op. O.L.C. 26, 27 (1996); Memorandum from Douglas W. Kmiec, Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, *Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File* (Apr. 11, 1989) [hereinafter Kmiec Memorandum], available at [http://www.aclu.org/sites/default/files/pdfs/immigrants/1989\\_olc\\_opinion.pdf](http://www.aclu.org/sites/default/files/pdfs/immigrants/1989_olc_opinion.pdf); HANNAH GLADSTEIN ET AL., *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004*, at 5 (2005) (discussing 1974 INS opinion); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1089–90 (2004). Some commentators went further to conclude that state and local officials also lacked general authority to enforce immigration law’s criminal provisions. *E.g.*, Renn, *supra* note 20.

<sup>22</sup> BROOKINGS INST. & UNIV. OF S. CAL. ANNENBERG SCH. FOR COMM’N, *DEMOCRACY IN THE AGE OF NEW MEDIA: A REPORT ON THE MEDIA AND THE IMMIGRATION DEBATE* 13, 23–27 (2008) (analyzing coverage of immigration since 1980 and concluding that it has “focused overwhelmingly” on crime and other illegality); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 42 & n.1 (2010).

<sup>23</sup> See *infra* Part V.B.

<sup>24</sup> Proposition 187, §§ 4, 9 (Cal. 1994).

<sup>25</sup> *Id.*; *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995); Peter J. Spiro, *The States and Immigration in an Era of Demi-sovereignities*, 35 VA. J. INT’L L. 121, 133 (1994). Ultimately, a settlement left the injunction in place. *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997). Also during this period, several states and localities sued the federal government—all unsuccessfully—seeking reimbursement for costs arising from unauthorized migration. See *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995).



More recently, a second, more aggressive wave of state and local efforts to undertake immigration policing has been underway, bolstered by a sustained effort following the 2001 terrorist attacks to challenge the longstanding view of subfederal immigration enforcement authority as narrowly limited.<sup>26</sup> The most consequential among these initiatives has been Arizona's S.B. 1070, which provides in Section 2 that state and local police officers must make a "reasonable attempt" to ascertain the immigration status of any individual who is lawfully stopped, detained, or arrested if an officer has reasonable suspicion that the individual is a noncitizen and unlawfully present, and must establish the immigration status of all individuals who are arrested before they may be released.<sup>27</sup> Another provision, Section 6, authorizes warrantless arrest of noncitizens for any criminal offense "that makes the person removable from the United States." In the aftermath of S.B. 1070's adoption, other states have adopted similar provisions.<sup>28</sup>

The substantive concerns raised by the prospect of unilateral state and local immigration policing—including the potential for racial profiling, distortion of federal enforcement priorities, and the erosion of police relationships with immigrant communities—have been well studied.<sup>29</sup> Although that attention has been well deserved, these initiatives ultimately may be less significant, both doctrinally and politically, for their own substantive effects than for their influence on *federal* policies to involve states and localities in immigration policing. Doctrinally, in *Arizona v. United States* the Supreme Court invalidated three of the four disputed provisions in S.B. 1070 as preempted by federal law, and as a result, future efforts by states and localities to unilaterally engage in immigration policing will face significant roadblocks when legally challenged.<sup>30</sup> At the same time, however, the Court's decision, on its own

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<sup>26</sup> See Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, *Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations* (Apr. 3, 2002), available at <http://www.aclu.org/sites/default/files/FilesPDFs/ACF27DA.pdf> (reversing previous Department of Justice position by concluding that state and local police have "inherent authority" to enforce federal civil immigration laws); see Wishnie, *supra* note 21, at 1085–87.

<sup>27</sup> S.B. 1070, 49th Leg., 2d Reg. Sess., § 6 (Ariz. 2010).

<sup>28</sup> *Id.* §§ 2, 6; see Karla Mari McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J.L. & POL'Y 333, 337–39 (2013). While these laws sweep more broadly, comparable but more limited schemes already had been implemented in several jurisdictions. Kalhan, *supra* note 1, at 1164–65; Rodríguez, *supra* note 1, at 591–92.

<sup>29</sup> E.g., ANITA KHASHU, *THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES* 21–30 (2009); Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 367 (2013); Chin & Miller, *supra* note 3; Muzaffar A. Chishti, *The Role of States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURV. AM. L. 371, 371–74 (2002); Keaney and Huerta, *supra* note 4; Sinema, *supra* note 4; Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 673–79 (2003).

<sup>30</sup> *Arizona v. United States*, 132 S. Ct. 2492 (2012).

terms, leaves ample room for state and local immigration policing under federal authorization and coordination. While it facially invalidated Section 6, the Court's reasoning turned principally on the provision's inconsistency with the specific avenues for enforcement cooperation defined by federal law—leaving open whether Congress could permissibly redefine that “cooperation” to authorize precisely the same scope of arrest authority, as some current proposals contemplate.<sup>31</sup> And in declining to facially invalidate Section 2, the Court emphasized that federal provisions authorizing state and local cooperation “leave[] room for a policy requiring state officials to contact ICE as a routine matter.”<sup>32</sup> While the Court reserved future challenges—particularly if Section 2 were interpreted to permit detention “solely to verify” immigration status or contemplated state custody “without federal direction or supervision”—its dicta presumed, despite the limited nature of the cooperation authorized by Congress, far-reaching authority for police to investigate and ask questions about immigration status.<sup>33</sup>

Politically, these initiatives have functioned as effective forms of what Heather Gerken terms “dissenting by deciding”: a means by which state and local governments have deployed their decision making authority in a manner that challenges the national status quo on immigration policy from a multiplicity of directions.<sup>34</sup> With immigration as with other issues, state and local actors often push the boundaries of what is generally understood as lawful or permissible precisely because they hope to dislodge and remake that national consensus.<sup>35</sup> The immigration policing measures taken by states and localities in recent decades have had precisely that effect, encouraging and reinforcing federal legislative, executive, and judicial efforts to facilitate state and local cooperation on immigration enforcement—which in turn have created even more space for state and local police to engage in practices akin to those contemplated by their own initiatives.<sup>36</sup>

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<sup>31</sup> *Id.* at 2506–07 (2012) (noting that unilateral state and local arrests “absent any request, approval, or other instruction” by federal officials exceed the “cooperation” contemplated by federal law); Strengthen and Fortify Enforcement Act, H.R. 2278, 113th Cong. § 102 (2013) (as reported by H. Comm. on the Judiciary, June 6, 2013) [hereinafter H.R. 2278]; see Campbell, *supra* note 29, at 394 (arguing that *Arizona* may prompt “more state reliance on cooperative immigration enforcement with federal authorities”); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497 (2001).

<sup>32</sup> *Arizona*, 132 S. Ct. at 2496.

<sup>33</sup> *Id.* at 2509; Chacón, *supra* note 7, at 610–15.

<sup>34</sup> Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

<sup>35</sup> *Id.*; see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265–71 (2009); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 69–72 (2011); Su, *supra* note 19, at 1354–55.

<sup>36</sup> Chacón, *supra* note 7, at 597–609; see Sinema, *supra* note 4 (discussing relationship between *Arizona*'s immigration legislation and out-of-state developments).

## B. Cooperative Federalism and Immigration Policing

Given the manner in which unilateral state and local immigration policing initiatives have contributed to the parallel development of federal initiatives to encourage cooperative state and local immigration policing from above, those federal initiatives may be more important than their comparatively low profile in public discourse suggests.<sup>37</sup> Cooperative immigration policing has a longer history than typically is assumed. As early as 1882, for example, when Congress barred several categories of noncitizens from entering the United States, it expressly authorized joint administration of the law by federal and state officials.<sup>38</sup> But while federal officials sometimes continued to enlist state and local police assistance even after Congress established exclusive federal control over immigration in 1891, these episodes were largely ad hoc, informal, and limited.<sup>39</sup> As recently as 1978, the Department of Justice expressly urged law enforcement agencies *not* to stop, question, detain, or arrest individuals based solely on suspicion that they might be deportable.<sup>40</sup>

This trajectory shifted in the 1980s, as the Reagan Administration cultivated more formal, institutionalized relationships with state and local governments to identify potentially deportable noncitizens in criminal custody.<sup>41</sup> These efforts evolved in tandem with the rise of formal federal–state–local partnerships to combat shared crime control priorities such as drugs, gang violence, and terrorism, and—like unilateral state and local immigration-related initiatives—within a context in which immigration and criminal control norms steadily

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<sup>37</sup> See Cox & Miles, *supra* note 12, at 92 (contending that subfederal immigration policing initiatives are “in some ways a sideshow” to federal initiatives); Lina Newton & Brian E. Adams, *State Immigration Policies: Innovation, Cooperation or Conflict?*, 39 PUBLIUS 408, 410 (2009) (emphasizing that states have legislated “within a federal policy context that encourages, facilitates, and in some cases, funds state efforts”).

<sup>38</sup> Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092, 1099–1104 (2013); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 6–26 (1995).

<sup>39</sup> See, e.g., Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the War on Terror*, 26 PACE L. REV. 1 (2005); ABRAHAM HOFFMAN, *UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929–1939*, at 41–48, 83–115 (1974); Robert S. Chapman & Robert F. Kane, *Illegal Aliens and Enforcement: Present Practices and Proposed Legislation*, 8 U.C. DAVIS L. REV. 127, 151 (1975).

<sup>40</sup> MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., R41423, *AUTHORITY OF STATE AND LOCAL POLICE TO ENFORCE FEDERAL IMMIGRATION LAW* 21–22 (2012).

<sup>41</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-78, *ILLEGAL ALIENS: INS PARTICIPATION IN ANTIGANG TASK FORCES IN LOS ANGELES* 7 (2000) (discussing Attorney General Edwin Meese III’s 1988 announcement of policy guidelines encouraging state and local police to cooperate with INS); Renn, *supra* note 20, at 1003 n.21 (discussing Attorney General William French Smith’s 1983 policy statement that INS would give “top priority” to cooperation with state and local authorities).

converged.<sup>42</sup> During the 1980s, joint federal–state–local task forces established to investigate and prosecute drug crimes quickly came to include the Immigration and Naturalization Service (INS), initially on an ad hoc basis and through pilot projects. By the 1990s and 2000s, the role of INS—and later, of its DHS successor, U.S. Immigration and Customs Enforcement (ICE)—in these and other joint task forces had become well established.<sup>43</sup> With pressure mounting from below during this period from initiatives like Proposition 187, the federal government built upon this nascent cooperation by establishing several programs, most of which are now clustered under an administrative umbrella called ICE ACCESS, to extend and formalize more direct state and local cooperation.<sup>44</sup>

*Immigration Policing Task Forces.* First, INS began to create its own specialized multiagency task forces to investigate specific categories of people suspected to be deportable. Most of these operations target individuals with prior convictions or unexecuted removal orders that might render them deportable, but at least one program, Operation Community Shield, targets suspected gang members without reference to any prior adjudications.<sup>45</sup> Outside of these formalized task forces, immigration officials also periodically have cooperated more informally with law enforcement agencies and prosecutors in particular operations, such as workplace and home raids.<sup>46</sup>

*State Criminal Alien Assistance Program.* Second, in 1994, Congress established the State Criminal Alien Assistance Program (SCAAP), under which the Department of Justice pays states and localities for costs incurred to

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<sup>42</sup> Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 393–95 (2006); William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, 15 CRIME & JUST. 231, 278, 298–312 (1992); Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941 (2005); see Kalhan, *supra* note 22, at 42 & n.1.

<sup>43</sup> Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 325 (2007); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-94-143, INS DRUG TASK FORCE ACTIVITIES: FEDERAL AGENCIES SUPPORTIVE OF INS EFFORTS 3–5 (1994); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 427–31, 434, 448–49 (1999). See generally OFFICE OF INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE DEPARTMENT OF JUSTICE’S TERRORISM TASK FORCES (2005).

<sup>44</sup> *Fact Sheet: ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS)*, ICE, <http://www.ice.gov/news/library/factsheets/access.htm> (last visited Oct. 2, 2013).

<sup>45</sup> Chacón, *supra* note 43, at 344–46.

<sup>46</sup> See BESS CHIU ET AL., CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 3 (2009); MARGOT MENDELSON ET AL., MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE’S FUGITIVE OPERATIONS PROGRAM 5, 25 (2009); U.S. DEP’T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS’ ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 6–15 (2011); Chacón, *supra* note 43, at 344–46; Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 573–74 (2005).

incarcerate undocumented immigrants with criminal convictions.<sup>47</sup> Funding levels have never fully covered these costs, and both the Bush and Obama Administrations have unsuccessfully sought the program's elimination.<sup>48</sup> However, while not required, funding recipients are encouraged to participate in DHS's ICE ACCESS programs, and by requiring funding requests to include detailed identifying information about noncitizens, SCAAP incentivizes states and localities to investigate and determine the immigration status of individuals in their custody and thereby helps ICE identify and locate individuals who might be deportable.<sup>49</sup>

*Law Enforcement Support Center.* Third, in 1994, INS established the Law Enforcement Support Center (LESC), a clearinghouse based in Vermont that fields around-the-clock inquiries from law enforcement agencies concerning the immigration status of individuals under investigation or in custody.<sup>50</sup> When LESC staff receive these inquiries—which now include queries transmitted under Secure Communities—they access immigration and criminal records in a multiplicity of DHS, FBI, state, and Interpol databases to ascertain the individual's immigration status, determine whether ICE has any interest in pursuing the individual's removal, and respond to the inquiring agency. If LESC believes the individual is potentially deportable and falls within ICE's enforcement priorities, or wishes to investigate further, then LESC or an ICE field office may issue a detainer, a document requesting the state or local law enforcement agency to hold the individual for forty-eight hours, in order to facilitate transfer of the individual into federal immigration custody.<sup>51</sup> From

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<sup>47</sup> 8 U.S.C. § 1231(i) (2012).

<sup>48</sup> KARMA ESTER, CONG. RESEARCH SERV., RL33431, IMMIGRATION: FREQUENTLY ASKED QUESTIONS ON THE STATE CRIMINAL ALIEN ASSISTANCE PROGRAM (SCAAP) 2 (2009); CTR. FOR IMMIGRATION STUDIES, SUBSIDIZING SANCTUARIES: THE STATE CRIMINAL ALIEN ASSISTANCE PROGRAM (2010).

<sup>49</sup> 8 U.S.C. § 1231(i); *State Criminal Alien Assistance Program (SCAAP)*, BUREAU OF JUSTICE ASSISTANCE, [http://www.bja.gov/ProgramDetails.aspx?Program\\_ID=86](http://www.bja.gov/ProgramDetails.aspx?Program_ID=86) (last visited Oct. 2, 2013); *Developments in the Law—Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1648–49 (2013); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES i (2007).

<sup>50</sup> *Law Enforcement Support Center*, ICE, <http://www.ice.gov/lesc> (last visited Oct. 2, 2013) [hereinafter ICE, *Law Enforcement Support Center*]; see also Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 204–06 (2005) (discussing INS “quick response teams” that were established in late 1990s to “respond[] to immigration arrests made by state and local police officers”).

<sup>51</sup> On ICE's use of detainers to facilitate transfer of individuals from state and local law enforcement custody to federal immigration custody, see KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES (2012); Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 281 (2013); TRAC IMMIGRATION, NUMBER OF ICE DETAINERS DROPS BY 19 PERCENT, July 25, 2013, <http://trac.syr.edu/immigration/reports/325>.

1996 to 2012, the number of inquiries sent to LESC skyrocketed from 4000 to over 1.3 million.<sup>52</sup>

*Criminal Alien Program.* Fourth, beginning in 1986, INS began dispatching deportation officers directly to prisons, jails, and courthouses to assess whether individuals in state or local custody or appearing at arraignments and other proceedings might be deportable. In the program's current incarnation as the Criminal Alien Program (CAP), state and local officials share lists of inmates and permit ICE officials to interview them, under circumstances ranging from in-person interviews by ICE personnel with permanent office space in the facility to interviews by telephone or videoconference.<sup>53</sup> When they identify potentially deportable prisoners falling within their enforcement priorities, ICE officials issue detainers to seek transfer into their custody.<sup>54</sup> While the extent to which prisoners are actually screened varies among facilities, ICE has a presence through CAP in every state and federal prison nationwide and more than 300 local jails, and the program accounts for approximately half of all individuals whom ICE takes into custody.<sup>55</sup>

*Section 287(g) Agreements.* Fifth, in 1996, Congress adopted Section 287(g) of the Immigration and Nationality Act, which authorizes federal authorities to enter agreements enabling state and local law enforcement officers, after training by federal authorities, to directly perform the functions of federal immigration officers under ICE's supervision—including screening individuals to ascertain their status, investigating cases, issuing detainers, arresting and charging suspected violators, and directly accessing DHS's databases.<sup>56</sup> ICE has utilized three models for its 287(g) agreements: (1) a "jail model" stationing officers in prisons and jails, (2) a "task force model" conferring broader authority to conduct immigration enforcement functions

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<sup>52</sup> ICE, *Law Enforcement Support Center*, *supra* note 50; Declaration of David C. Palmatier, Unit Chief, Law Enforcement Support Center, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB) [hereinafter *Palmatier Declaration*], *available at* <http://www.justice.gov/opa/documents/declaration-of-david-palmatier.pdf>; PRIVACY OFFICE, U.S. DEP'T OF HOMELAND SEC., *PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ALIEN CRIMINAL RESPONSE INFORMATION MANAGEMENT SYSTEM (ACRIME) & ENFORCEMENT INTEGRATED DATABASE (EID)* (2010); LISA M. SEGHEITTI ET AL., CONG. RESEARCH SERV., RL33270, *ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT* 19–20 (2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/AIMD-95-147, *LAW ENFORCEMENT SUPPORT CENTER: NAME-BASED SYSTEMS LIMIT ABILITY TO IDENTIFY ARRESTED ALIENS* (1995); Schuck & Williams, *supra* note 43, at 451–53.

<sup>53</sup> ANDREA GUTTIN, IMMIGRATION POLICY CTR., *THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS* 5 (2010).

<sup>54</sup> Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 173–82 (2008) (discussing the role of detainers as the "key mechanism for implementing the federal Criminal Alien Program").

<sup>55</sup> GUTTIN, *supra* note 53, at 4–6.

<sup>56</sup> 8 U.S.C. § 1357(g) (2012); *see also id.* § 1103(a)(10) (conferring Attorney General with emergency powers to deputize state and local law enforcement officials as immigration officers in the event of a "mass influx of aliens").

during routine law enforcement activities in the field, and (3) a “hybrid model” combining both approaches.<sup>57</sup> The number of agreements escalated sharply after 2006, growing from seven to seventy-five by 2009.<sup>58</sup> However, with this expansion came documented concerns that jurisdictions were increasingly using the program to maximize the number of immigration arrests, even for minor violations, rather than focusing on ICE’s enforcement priorities, such as individuals with serious criminal histories. In response to these and related concerns, including concerns about racial profiling in some jurisdictions, the Obama Administration restructured the program in 2009 to align it more closely with ICE’s priorities and to tighten federal oversight.<sup>59</sup> In 2012, the Obama Administration went further, phasing out all of its task force agreements in light of its nationwide implementation of Secure Communities, which it maintains is “more consistent, efficient and cost effective.”<sup>60</sup>

*Prohibitions Against State and Local Non-cooperation.* Finally, Congress enacted two provisions in 1996 prohibiting state and local governments from restricting their agencies and officials from sending immigration status information to federal authorities, maintaining that information, or exchanging that information with other federal, state, or local government entities.<sup>61</sup> Legislative history indicates that Congress adopted these provisions in response to the wave of local laws adopted during the 1970s and 1980s limiting cooperation with federal immigration officials. However, the extent to which these provisions preempt state and local laws protecting the confidentiality of immigration status information remains uncertain.<sup>62</sup>

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<sup>57</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 8 (2009); RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT (2011); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582–86 (2010).

<sup>58</sup> Chacón, *supra* note 57, at 1582 n.88.

<sup>59</sup> CRISTINA RODRÍGUEZ ET AL., MIGRATION POLICY INST., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) (2010).

<sup>60</sup> Leslie Berestein Rojas, *A Phase-Out for 287(g) Immigration Enforcement Partnerships*, 89.3 KPCC S. CAL. PUB. RADIO (Dec. 27, 2012, 12:58 PM), [http://www.scpr.org/blogs/multiamerican/2012/12/27/11741/gradual-phase-out-287g-immigration-enforcement-pro](http://www.scpr.org/blogs/multiamerican/2012/12/27/11741/gradual-phase-out-287g-immigration-enforcement-pro; ICE Response to NSA Questions in a Letter Dated July 11, 2012, ICE, http://www.sheriffs.org/sites/default/files/uploads/documents/GovAffairs/Exhibit%20%235.pdf); ICE Response to NSA Questions in a Letter Dated July 11, 2012, ICE, <http://www.sheriffs.org/sites/default/files/uploads/documents/GovAffairs/Exhibit%20%235.pdf>. ICE reaffirmed its commitment to its jail-based agreements, all of which remain in effect.

<sup>61</sup> 8 U.S.C. §§ 1373, 1644.

<sup>62</sup> *Id.*; see *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999); Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, in IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE 194–96 (Ariane Chebel d’Appollonia & Simon Reich eds., 2008), available at <http://ssrn.com/abstract=1145666>.

### C. *The Emerging Immigration Federalism Equilibrium*

As with other areas of immigration policy, the evolution of immigration federalism with respect to immigration policing has been contentious and uneven, characterized by considerable uncertainty and disagreement over the proper role that state and local governments should play in unilaterally adopting their own measures or implementing federal measures aimed at controlling immigration. However, over time, an equilibrium has been emerging from these developments. On the one hand, the enforcement practices that have emerged in recent years—even in the aftermath of *Arizona*'s “ode to federal power” over immigration—contemplate high levels of state and local immigration policing under federal supervision and coordination, along with some continuing room for unilateral policing and prosecution of state crimes that function as immigration enforcement proxies.<sup>63</sup> Like other interior immigration enforcement initiatives, these federal initiatives to enlist state and local cooperation seek to transform immigration status from something largely irrelevant and invisible into something visible and salient across a broader range of domains and policed by a broader range of actors.<sup>64</sup>

Proponents of these federal initiatives have argued that they help to address a persistent information deficit—ICE's lack of sufficient information to effectively identify, locate, arrest, and deport immigration law violators—by harnessing law enforcement and criminal justice officials as “force multipliers.”<sup>65</sup> From this perspective, state and local police are helpful for their much greater strength in numbers and because they are presumed to be better positioned to identify and apprehend potentially deportable noncitizens on account of their greater knowledge of local communities.<sup>66</sup> Particularly under circumstances in which the number of potentially deportable noncitizens is exceedingly high, federal immigration officials depend heavily on the assistance of state and local law enforcement agencies to administer and enforce the immigration enforcement policies and priorities that Congress and the President have adopted—especially those policies concerning the deportation of noncitizens with criminal convictions.<sup>67</sup>

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<sup>63</sup> Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 602–03 (2013); see Chacón, *supra* note 7; Eagly, *supra* note 7; Kalhan, *supra* note 62, at 201–02.

<sup>64</sup> Kalhan, *supra* note 1; see *infra* Part IV.B.

<sup>65</sup> Kobach, *supra* note 50; Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 61–62 (2013).

<sup>66</sup> Cox, *supra* note 65, at 61–62; see Kobach, *supra* note 50; Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 112–14 (2012); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1699–1770 (2001).

<sup>67</sup> Eagly, *supra* note 7, at 1788; see Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 71–77 (2007) (arguing that “where enforcement against criminal aliens is concerned . . . federal immigration officials are practically impotent without the substantial help of the state and local criminal justice systems”).



On the other hand, the picture of immigration federalism that has been emerging from these enforcement initiatives presumes some level of self-conscious, calibrated, and negotiated choice by states and localities concerning the extent to enmesh their law enforcement agencies with immigration policing activities. Indeed, one unusual feature of these initiatives has been their uneven embrace by state and local officials—which runs counter to what David Harris characterizes as law enforcement’s “well-established, years-long pattern of continually seeking to enlarge [its] power.”<sup>68</sup> To be sure, many law enforcement agencies have welcomed the opportunity to cooperate with immigration authorities, and even jurisdictions that have not affirmatively chosen high levels of participation in these programs have been profoundly shaped by the expansion of mass immigration enforcement, which has created severe immigration consequences for broad categories of state criminal justice outcomes and influenced day-to-day police and criminal justice practices in other ways.<sup>69</sup>

Still, even those powerful influences have left room for a range of voluntary state and local choices.<sup>70</sup> And in varying degrees many law enforcement agencies have resisted federal efforts to draw them into immigration policing, based primarily on concerns that undertaking immigration enforcement activities would undermine their ability to achieve broader public safety objectives—for example, by deterring crime victims and witnesses within immigrant communities from cooperating with the police.<sup>71</sup> This resistance has dovetailed with related concerns raised by civil rights and community-based organizations that echo criticisms of unilateral state and local immigration policing.<sup>72</sup> While the federal government has promoted state and local immigration policing more assertively over time, the space preserved for some

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<sup>68</sup> David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 7 (2006).

<sup>69</sup> Monica W. Varsanyi et al., *A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States*, 34 LAW & POL’Y 138 (2012); Eagly, *supra* note 9, at 1129; Chacón, *supra* note 7, at 601–02.

<sup>70</sup> Eagly, *supra* note 9, at 1130; Anil Kalhan, *Rahmmigration, Romneygration, and Federalism*, DORF ON LAW (July 25, 2012), <http://www.dorfonlaw.org/2012/07/rahmmigration-and-romneygration.html>.

<sup>71</sup> Harris, *supra* note 68, at 33–44; Richman, *supra* note 42, at 407–15; Varsanyi et al., *supra* note 69, at 153; POLICE EXEC. RESEARCH FORUM, VOICES FROM ACROSS THE COUNTRY: LOCAL LAW ENFORCEMENT OFFICIALS DISCUSS THE CHALLENGES OF IMMIGRATION ENFORCEMENT (2012); KHASHU, *supra* note 29, at 23–30.

<sup>72</sup> ACLU OF N. CAL., COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES (2011); ACLU OF N.C., THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA (2009); HUMAN RIGHTS WATCH, WITHIN REACH: A ROADMAP FOR US IMMIGRATION REFORM THAT RESPECTS THE RIGHTS OF ALL PEOPLE 10–11 (2013); CAPPS ET AL., *supra* note 57, at 38–47; AARTI SHAHANI & JUDITH GREENE, JUSTICE STRATEGIES, LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION LAW (2009).

local control has left the boundaries of immigration federalism to be shaped not only by legal rules, but also by both explicit and tacit negotiation.<sup>73</sup>

### III. THE EMERGENCE OF AUTOMATED IMMIGRATION POLICING

Even as *Arizona* has stabilized this emerging equilibrium against challenges from below, a new, technology-based federal model of enlisting state and local immigration policing is disrupting that equilibrium from above—not just by expanding the number of state and local police involved in immigration enforcement, but by effecting a more basic shift in the nature of immigration policing itself.<sup>74</sup> In this Part, I analyze the two automated immigration policing initiatives that the federal government has implemented and the very different model of immigration federalism that those initiatives have been fashioning. First, I consider the expanded use of the FBI's main identification and criminal records database system, the National Crime Information Center (NCIC), for immigration enforcement purposes. Second, I examine the Secure Communities program, which the Bush Administration launched in 2008 to “improve and modernize” the process of removing noncitizens with criminal convictions. Finally, I assess how these initiatives have eroded the approach to immigration federalism that has been emerging in recent decades.

#### A. NCIC Immigration Violators File

Soon after the 2001 terrorist attacks, as part of the Bush Administration's broader effort to encourage state and local immigration policing and reorient law enforcement institutions toward preventing terrorism, it directed immigration officials to enter hundreds of thousands of civil immigration records into the NCIC.<sup>75</sup> The NCIC—which has existed in computerized form since 1967, and whose manual predecessors Congress first authorized in 1930—is a clearinghouse established to enable federal, state, local, tribal, territorial, and other law enforcement agencies to exchange crime-related records, in order to assist with criminal investigation, prosecution, and sentencing. Although maintained by the FBI, most records and queries come from other law enforcement agencies, which access the system's multiple databases millions of

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<sup>73</sup> Eagly, *supra* note 7, at 1788; cf. Daniel C. Richman, *The Changing Boundaries Between Federal and Local Enforcement*, in BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81–111 (Charles M. Friel ed., 2000) (discussing the ways in which the boundaries between the spheres of federal and state criminal law primarily have been shaped not by substantive criminal law itself, but rather by processes of “explicit or tacit negotiation among enforcement agencies”).

<sup>74</sup> See MARX, *supra* note 18, at 208 (arguing that “[c]omputers qualitatively alter the nature of surveillance—routinizing, broadening, and deepening it”).

<sup>75</sup> See Wishnie, *supra* note 21, at 1095–1101.

times each day, usually with rapid responses, during routine encounters with the public and other ordinary law enforcement duties.<sup>76</sup>

The FBI shares management of this system with its participants. Shared governance takes the form of an advisory board of criminal justice officials from around the country, along with an unusual and complex mix of federal law, state law, an interstate compact, and voluntary participation.<sup>77</sup> Operationally, participating agencies enter, modify, and remove their own records and are responsible for their validity. Moreover, since 1983 the maintenance and exchange of criminal history records has become more decentralized with the creation of the Interstate Identification Index (III), which is accessible through the NCIC but contains no criminal history records of its own. Rather, the III is an index pointer system that directs users to the state criminal history repositories where these “rap sheets” are held and enables their direct retrieval, thereby eliminating the need for states to maintain and update full duplicate records with the FBI.<sup>78</sup> The III entries are “fingerprint-supported”: they are initially created (and subsequently updated) when states submit an individual’s fingerprint record to the FBI’s Integrated Automated Fingerprint Identification System (IAFIS), which integrates and stores fingerprints and other personal information collected and submitted by federal, state, and local law enforcement agencies and other contributors for over 100 million subjects.<sup>79</sup> Once states’ information systems meet certain qualifications, they may participate in the III’s National Fingerprint File, which further decentralizes criminal history recordkeeping by only requiring submission of fingerprints to IAFIS for the subject’s initial arrest; for subsequent arrests, the state agency sends only an update notice.<sup>80</sup>

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<sup>76</sup> See *id.*; Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 584–85 (2009); DAVID BURNHAM, *THE RISE OF THE COMPUTER STATE* 67–87 (1983); OFFICE OF TECH. ASSESSMENT, *AN ASSESSMENT OF ALTERNATIVES FOR A NATIONAL COMPUTERIZED CRIMINAL HISTORY SYSTEM* 26–36 (1982); Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1874–85 (2004).

<sup>77</sup> 28 U.S.C. § 534 (2006) (directing Attorney General to “acquire, collect, classify, and preserve identification, criminal identification, crime, and other records,” and exchange those records with authorized federal, state, and local institutions); National Crime Prevention and Privacy Compact, 42 U.S.C. § 14616 (2006); 28 C.F.R. pt. 20 (2013); see *National Crime Information Center*, FBI, <http://www.fbi.gov/about-us/cjis/ncic> [hereinafter FBI, *National Crime Information Center*] (last visited Oct. 2, 2013); *The CJIS Advisory Process: A Shared Management Concept*, FBI, [http://www.fbi.gov/about-us/cjis/advisory-policy-board/advisory\\_policy\\_board](http://www.fbi.gov/about-us/cjis/advisory-policy-board/advisory_policy_board) (last visited Oct. 2, 2013); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177 (2008); OFFICE OF TECH. ASSESSMENT, *supra* note 76.

<sup>78</sup> Jacobs & Crepet, *supra* note 77, at 181–82.

<sup>79</sup> U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 15–16 (2006) [hereinafter ATTORNEY GENERAL’S REPORT].

<sup>80</sup> 28 C.F.R. §§ 20.3, 20.36–.37, 20.85(b), 905.1–.3; *Integrated Automated Fingerprint Identification System*, FBI, [http://www.fbi.gov/about-us/cjis/fingerprints\\_biometrics/iafis/](http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/)

The size, scope, and accessibility of the NCIC has grown enormously. When first established in 1967, the NCIC consisted of five files and only was used to identify and locate individuals with formal criminal records or outstanding criminal warrants.<sup>81</sup> However, in 1983, the FBI extended its scope to encompass information for intelligence purposes by adding individuals suspected by the Secret Service of being threats to its protectees.<sup>82</sup> Since then, the NCIC's scope has expanded to include other noncriminal records, including information on suspected gang members and terrorists, registered sex offenders, and subjects of domestic violence protection orders. In 2006, the FBI proposed to expand the scope of the NCIC's criminal history records to include juvenile and lower level criminal offenses.<sup>83</sup> Today, the NCIC consists of over eleven million records in twenty-one files. With over 90,000 participating agencies nationwide and in Canada—including DHS agencies that access the system for immigration control purposes—and with increasing use of mobile technology, the system has become very widely accessible.<sup>84</sup>

The inclusion of civil immigration records in the NCIC has come in the context of this steady expansion of the system's scope and uses more generally. Although briefly permitted to enter immigration warrants into the system soon after its establishment, INS suspended this practice after concluding that state and local police lacked general arrest authority for civil immigration violations—a decision that the Department of Justice reaffirmed in 1989.<sup>85</sup> In 1996, however, Congress expressly authorized state and local officials to make criminal arrests for illegal reentry by previously deported felons and, in conjunction with that authorization, simultaneously authorized inclusion in the NCIC of any related immigration records.<sup>86</sup>

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iafis (last visited Oct. 2, 2013); see Jacobs & Crepet, *supra* note 77, at 181–82; *Privacy Impact Assessment for the Fingerprint Identification Records System (FIRS) Integrated Automated Fingerprint Identification System (IAFIS) Outsourcing for Noncriminal Justice Purposes—Channeling* ¶ I-2.4, FBI (May 5, 2008), <http://www.fbi.gov/foia/privacy-impact-assessments/firs-iafis>; ATTORNEY GENERAL'S REPORT, *supra* note 79, at 16; PETER KOMARINSKI, AUTOMATED FINGERPRINT IDENTIFICATION SYSTEMS (AFIS) 41–46 (2005); OFFICE OF TECH. ASSESSMENT, *supra* note 76; OFFICE OF TECH. ASSESSMENT, A PRELIMINARY ASSESSMENT OF THE NATIONAL CRIME INFORMATION CENTER AND THE COMPUTERIZED CRIMINAL HISTORY SYSTEM (1978).

<sup>81</sup> OFFICE OF TECH. ASSESSMENT, ELECTRONIC SURVEILLANCE AND CIVIL LIBERTIES 68 (1985).

<sup>82</sup> Memorandum from Theodore B. Olson, Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, *United States Secret Service Use of the National Crime Information Center*, 6 Op. O.L.C. 313, 318–19 (1982).

<sup>83</sup> Jacobs & Crepet, *supra* note 77, at 188.

<sup>84</sup> FBI, *National Crime Information Center*, *supra* note 77; CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, LAW ENFORCEMENT RECORDS MANAGEMENT SYSTEMS (RMSS) AS THEY PERTAIN TO FBI PROGRAMS AND SYSTEMS 14–16 (2010); Jacobs & Crepet, *supra* note 77.

<sup>85</sup> Kmiec Memorandum, *supra* note 21.

<sup>86</sup> 8 U.S.C. § 1252c(b) (2012); see Wishnie, *supra* note 21, at 1098; GLADSTEIN ET AL., *supra* note 21, at 5–6.

In the aftermath of the 2001 terrorist attacks, the Bush Administration—under more uncertain statutory authority than the express authorization given by Congress in 1996—significantly expanded the categories of civil immigration records included in the NCIC, ostensibly for antiterrorism purposes but in practice sweeping more broadly.<sup>87</sup> In late 2001, the government began entering records concerning individuals who it has termed “absconders” or “fugitives”: individuals with prior removal orders who are believed to remain in the United States, a category estimated to total approximately 314,000 individuals at the time and almost 470,000 individuals today.<sup>88</sup> The next year, the government announced the entry of records concerning individuals suspected of failing to register with the National Security Entry–Exit Registration System, a program requiring certain nationals of two dozen predominantly Muslim countries and North Korea to register with immigration authorities.<sup>89</sup>

Whenever a police officer sends the NCIC a wanted person inquiry, using name- and demographic-based information, the NCIC’s Immigration Violators File (IVF) is automatically searched along with most of the NCIC’s other person files and some property files. No affirmative choice is required to search the IVF; nor can officers elect for their queries to be conducted without searching that file. If a query yields a positive response from the IVF, the system’s response directs the officer to call LESC to confirm the database “hit” and give ICE an opportunity to file a detainer.<sup>90</sup> These inquiries may be conducted not only upon a traffic or pedestrian stop based on reasonable suspicion, but also before any stop takes place and without any suspicion—for example, using license plate or vehicle identification numbers alone.<sup>91</sup>

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<sup>87</sup> MUZAFFAR A. CHISHTI ET AL., *MIGRATION POLICY INST., AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11*, at 80–84 (2003); Wishnie, *supra* note 21, at 1096–1101 (analyzing statute and concluding that the government lacks authority to include civil records in the NCIC unless specifically authorized).

<sup>88</sup> Wishnie, *supra* note 21, at 1086; *Fugitive Operations*, ICE, <http://www.ice.gov/fugitive-operations/index.htm> (last visited Oct. 2, 2013); see Lapp, *supra* note 46. Studies indicate that a large percentage of these individuals never received notice of their potential removability and were ordered removed in absentia. See, e.g., GLADSTEIN ET AL., *supra* note 21, at 7.

<sup>89</sup> Wishnie, *supra* note 21, at 1096–97; see Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1507–08 (2010). While the Bush Administration announced its intention to enter information on suspected student visa violators and previously deported individuals with misdemeanor convictions, it ultimately refrained from doing so. Dan Eggen, *U.S. Considers Expanding FBI Database*, WASH. POST, Dec. 17, 2003, at A12; Wishnie, *supra* note 21, at 1087 n.13.

<sup>90</sup> NAT’L CRIME INFO. CTR., NCIC 2000 OPERATING MANUAL: IMMIGRATION VIOLATORS FILE §§ 5.1–5.6 (2000) [hereinafter NAT’L CRIME INFO. CTR., IMMIGRATION VIOLATORS FILE]; Sullivan, *supra* note 76, at 586–87.

<sup>91</sup> NAT’L CRIME INFO. CTR., NCIC 2000 OPERATING MANUAL: WANTED PERSONS FILE § 5.3(1) (2000); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL JUSTICE “HOT” FILES 11 (1986); WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3(c) (2011 & Supp. 2012); see also RICHARD V. ERICSON & KEVIN

Increasingly, suspicionless license plate inquiries may be conducted by automated plate readers, which, in addition to tracking vehicle location and movements, may facilitate NCIC searches on a larger scale.<sup>92</sup>

### B. *Secure Communities*

In the extent to which they enmesh state and local police in immigration enforcement, all previous federal initiatives are dwarfed by Secure Communities. In appropriations legislation for 2008, Congress directed ICE to develop a plan to “identify every criminal alien, at the prison, jail, or correctional institution in which they are held” and establish a process to remove those judged deportable using a methodology that prioritizes noncitizens convicted of “violent crimes.”<sup>93</sup> In response, ICE formulated a strategy intended to identify these individuals in much larger numbers while simultaneously doing so in a less labor- and time-intensive manner, emphasizing automated biometric identification and information sharing among DHS, the FBI, and states and localities and risk-based methods of prioritizing individuals presenting the greatest risks to public safety.<sup>94</sup>

While efforts to make DHS and FBI databases interoperable are longstanding, Secure Communities aggressively goes further by seeking to establish what ICE terms a “virtual presence in every jail” at the moment that every arrestee nationwide is booked.<sup>95</sup> Although practices vary widely among

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D. HAGGERTY, *POLICING THE RISK SOCIETY* 140–41 (1997) (discussing similar uses by Canadian law enforcement officials of Canada’s criminal records database system, the Canadian Police Information Centre).

<sup>92</sup> FBI, *License Plate Reader Technology Enhances the Identification, Recovery of Stolen Vehicles*, CJIS LINK, Sept. 2011, at 3, available at <http://www.fbi.gov/about-us/cjis/cjis-link/september-2011/license-plate-reader-technology-enhances-the-identification-recovery-of-stolen-vehicles/> (stating that license plate reader technology had enabled location of 818 wanted persons via the NCIC); Julia Angwin & Jennifer Valentino-DeVries, *New Tracking Frontier: Your License Plates*, WALL ST. J., Sept. 29, 2012, at 19.

<sup>93</sup> Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2050–51 (2007).

<sup>94</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SEC., *SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS* (2009) [hereinafter ICE, *SECURE COMMUNITIES*].

<sup>95</sup> Patrick McGee, *More Scrutiny Sought for Jailed Immigrants*, FT. WORTH STAR-TELEGRAM, Apr. 10, 2008, at A7 (quoting ICE director Julie Myers); see PRIVACY OFFICE, U.S. DEP’T OF HOMELAND SEC., *PRIVACY IMPACT ASSESSMENT FOR THE UNITED STATES VISITOR AND IMMIGRANT STATUS INDICATOR TECHNOLOGY (US-VISIT) PROGRAM* (2008); CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, *supra* note 84, at 9–10. Like other immigration control initiatives following the 2001 terrorist attacks, the effort to make these database systems interoperable has roots in the 1990s, albeit with somewhat different emphasis. See OFFICE OF INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *THE RAFAEL RESENDEZ-RAMIREZ CASE: A REVIEW OF THE INS’S ACTIONS AND THE OPERATION OF ITS IDENT AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM* (2000) [hereinafter OFFICE OF INSPECTOR GEN., *RAFAEL RESENDEZ-RAMIREZ CASE*]; NAT’L COMM’N ON TERRORIST ATTACKS UPON THE

jurisdictions, particularly for minor offenses, during the typical post-arrest booking process police record an arrestee's fingerprints, and transmit them to their state's criminal records repository.<sup>96</sup> In turn, although not required by federal law, all states voluntarily submit these fingerprints to the FBI's IAFIS system for individuals arrested of felonies and serious misdemeanors—usually with a request for a response providing identification and criminal history information, but in many instances simply to update the FBI's records.<sup>97</sup> Upon receipt, the FBI processes the fingerprints and, as applicable, generates a response—a process which, according to the FBI, on average now takes only thirty minutes for criminal fingerprint submissions, compared to much longer periods even a few years ago.<sup>98</sup>

Under Secure Communities, as illustrated in Figure 1, the FBI simultaneously transmits these fingerprints—which necessarily include prints of U.S. citizens and lawfully present noncitizens who have been arrested and booked—for comparison against records in DHS's Automated Biometric Identification System, which INS originally developed to help the Border Patrol identify and track individuals unlawfully crossing the U.S.–Mexico border.<sup>99</sup> Today, this database system, generally referred to as IDENT, is used for a range of other immigration control functions and constitutes the main DHS-wide biometric and biographic information system. Growing at a rate of ten million new entries per year, IDENT holds records on over 148 million subjects who have had any contact with DHS, other agencies, and even other governments—including visa applicants at U.S. embassies and consulates, noncitizens traveling to and from the United States, noncitizens applying for immigration benefits (including asylum), unauthorized migrants apprehended at the border or at sea, suspected immigration law violators encountered or arrested within

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U.S., THE 9/11 COMMISSION REPORT 80–82, 416–19 (2011); Schuck & Williams, *supra* note 43, at 453.

<sup>96</sup> HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES, FINDINGS AND RECOMMENDATIONS 18 (2011) [hereinafter TASK FORCE ON SECURE COMMUNITIES], *available at* <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf>.

<sup>97</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 12–14 (2001); LAFAVE, *supra* note 91, § 5.1(e); *see* CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, *supra* note 84, at 9; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-260, LAW ENFORCEMENT: INFORMATION ON TIMELINESS OF CRIMINAL FINGERPRINT SUBMISSIONS TO THE FBI 7–8 (2004). As discussed above, states participating in the final phase of the III and using the National Fingerprint File only submit fingerprints for initial arrests.

<sup>98</sup> FBI, *Integrated Automated Fingerprint Identification System*, *supra* note 80, ¶ I-2.4; THE FINGERPRINT SOURCEBOOK 6.12 (Nat'l Inst. of Justice ed. 2011).

<sup>99</sup> OFFICE OF INSPECTOR GEN., RAFAEL RESENDEZ-RAMIREZ CASE, *supra* note 95; Thomas V. Brady, *The IDENT System: Putting "Structure to the Chaos of the Border,"* 237 NAT'L INST. JUST. J. 21, 21 (1998).

the United States, and even U.S. citizens approved to participate in DHS's "trusted traveler" programs or who have adopted children from abroad. Given its data collection and retention practices, IDENT contains fingerprint records for many naturalized U.S. citizens who were fingerprinted before naturalizing and lawfully present noncitizens, and by the same token does not include records of noncitizens who have never had any contact with DHS, such as those who have entered the United States without inspection.<sup>100</sup> Moreover, internal government documents indicate that DHS may now also be retaining in IDENT the fingerprints of all U.S. citizens whose fingerprints have been shared by the FBI through Secure Communities.<sup>101</sup>

If fingerprints transmitted from IAFIS under Secure Communities match a record in IDENT—and even if there is no match, but the individual has an unknown or non-U.S. place of birth—the system automatically flags the record and notifies LESC, which reviews a series of databases in an attempt to ascertain the individual's immigration status and criminal history. With rapidly growing volumes of status determination requests, ICE is further automating this process—for example, by automatically retrieving records and categorizing individuals' criminal histories.<sup>102</sup> If this review yields a match, LESC notifies the originating law enforcement agency and the relevant ICE field office, which decides, based on enforcement priorities and other factors, whether to interview the individual or issue a detainer requesting that the agency hold the individual.<sup>103</sup>

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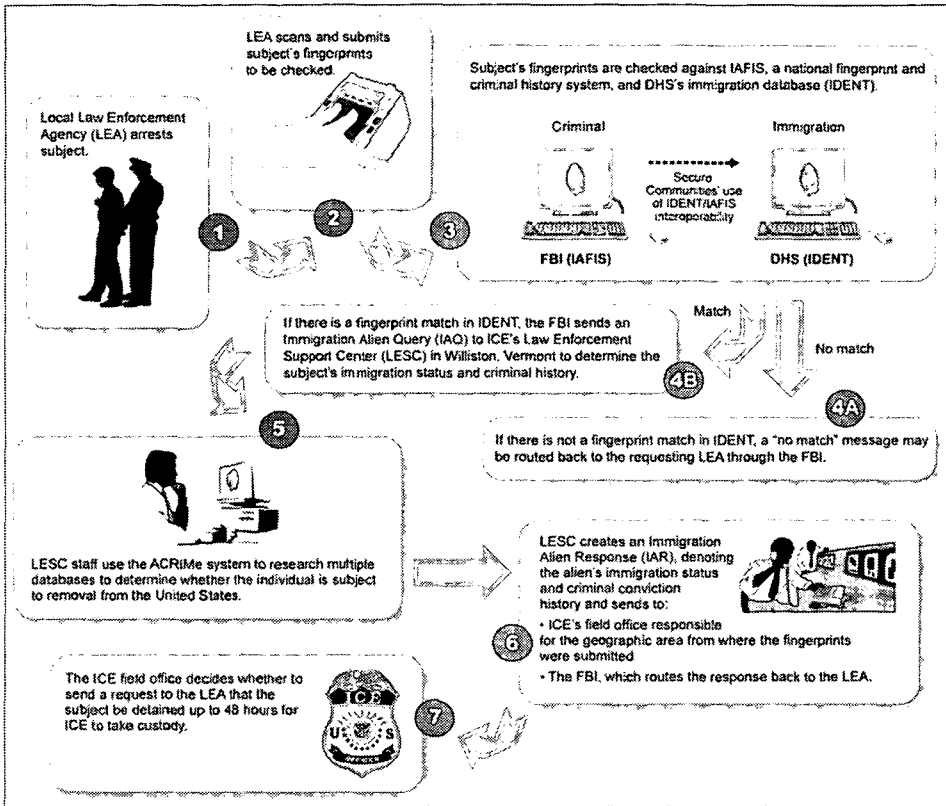
<sup>100</sup> PRIVACY OFFICE, U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT) 11–15 (2012); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OPERATIONS OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S SECURE COMMUNITIES 4–5 (2012) [hereinafter DHS OIG, SECURE COMMUNITIES OPERATIONS REPORT]; WASLIN, *supra* note 14, at 4.

<sup>101</sup> First Amended Complaint ¶ 24 & Exs. E–G, *Makowski v. Holder*, No. 12 Civ. 5265 (N.D. Ill. Dec. 17, 2012).

<sup>102</sup> PRIVACY OFFICE, U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR ACRIME AND EID 6–8 (2010), available at <http://www.dhs.gov/xlibrary/assets/privacy/pia-ice-acrime-eid-update-20100929.pdf>. While ICE prioritizes removal of all deportable noncitizens with criminal convictions, it categorizes these individuals within a three-level hierarchy based on criminal histories. DHS OIG, SECURE COMMUNITIES OPERATIONS REPORT, *supra* note 100, at 9.

<sup>103</sup> GAO, SECURE COMMUNITIES, *supra* note 11, at 7–9; DHS OIG, SECURE COMMUNITIES OPERATIONS REPORT, *supra* note 100, at 4, 7–8; ICE, SECURE COMMUNITIES, *supra* note 94, at 3; CTR. FOR CONSTITUTIONAL RIGHTS ET AL., NEW DEVELOPMENTS IN SECURE COMMUNITIES AND NEXT GENERATION IDENTIFICATION (2012); Verini, *supra* note 12, at 6.



Figure 1: *The Secure Communities Process*<sup>104</sup>

Source: GAO analysis of information provided by ICE.

ICE implemented Secure Communities in stages, entering agreements with state governments and activating the program county-by-county.<sup>105</sup> In the process, the agency caused public confusion by communicating conflicting positions about the program's legal basis and whether the agency deemed state and local participation mandatory. When the program was launched, federal officials stated that—like previous immigration policing initiatives—Secure Communities was voluntary and states could “opt out.” However, community opposition mounted quickly as the program was implemented, prompting several states to exercise this opt-out option. In response, DHS shifted course and stated that the program was mandatory. Eventually, DHS terminated all forty-two of its agreements with state governments—not to terminate the program itself, but on the ground that they were never legally required at all.<sup>106</sup>

<sup>104</sup> GAO, SECURE COMMUNITIES, *supra* note 11, at 9.

<sup>105</sup> Cox & Miles, *supra* note 12, at 93.

<sup>106</sup> Nat'l Day Laborers Org. Network v. U.S. Immigration & Customs Enforcement, 811 F. Supp. 2d 713, 742 (S.D.N.Y. 2011) (discussing “ample evidence that ICE and DHS have gone out of their way to mislead the public about Secure Communities”); OFFICE OF

In the wake of these controversies, the legal authority for Secure Communities has remained unclear. No statute unquestionably authorizes the program or mandates state and local participation, and no regulations specifically govern its operations.<sup>107</sup> In addition to appropriations legislation, DHS has cited the general provision authorizing the Attorney General to maintain and disseminate crime-related records—the same general provision under which the FBI has issued regulations governing the NCIC and IAFIS—and a provision in the Visa Reform Act of 2002 directing the federal government to make its database systems interoperable and “readily and easily accessible” to federal immigration officials “responsible for determining an alien’s admissibility . . . or deportability.”<sup>108</sup>

However, the authority cited by DHS is not unambiguous. The Attorney General’s general criminal recordkeeping authority—whose “very general nature” long had prompted the FBI to act “cautiously” in how it maintained and disseminated state and local records in its possession—limits sharing of those records to “authorized” federal officials, leaving unanswered the extent of any authority to disseminate FBI-maintained fingerprint records to DHS.<sup>109</sup> Moreover, while the Visa Reform Act seems to clearly authorize access to FBI records when immigration or consular officials need to make particular decisions about visa issuance, admissibility, or deportability, it is less clear that the provision authorizes the routine bulk transmission to DHS of *all* state and local identification records in its possession—on an ongoing basis as it receives them—of both U.S. citizens and noncitizens in the absence of specific, pending

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INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., COMMUNICATION REGARDING PARTICIPATION IN SECURE COMMUNITIES (2012); TASK FORCE ON SECURE COMMUNITIES, *supra* note 96, at 18; *see also* Erica Lynn Tokar, *Unlocking Secure Communities: The Role of the Freedom of Information Act in the Department of Homeland Security’s Secure Communities*, 5 LEGIS. & POL’Y BRIEF 4 (2013); Elise Foley, *Zoe Lofgren: DHS May Have Misled Public on Immigration Program*, HUFFINGTON POST (Apr. 28, 2011), <http://huff.to/mHSYWG>.

<sup>107</sup> A bill recently adopted by the House Judiciary Committee would direct DHS to “continue to operate and implement a program” that identifies removable criminal aliens in federal or state correctional facilities, ensures that they are not released into the community, and removes them upon completion of their sentences—and conditions SCAAP funding upon state cooperation and participation. H.R. 2278, 113th Cong. § 111(a) (2013). Even this bill, however, provides no framework for the program that it mandates.

<sup>108</sup> 8 U.S.C. § 1722(a)(5) (2012); 28 U.S.C. § 534(a) (2006); *see* Memorandum from Riah Ramlogan, Dep. Principal Legal Advisor, Office of Principal Legal Advisor, U.S. Immigration & Customs Enforcement, *Secure Communities—Mandatory in 2013* (Oct. 2, 2010), *available at* [http://www.epic.org/privacy/secure\\_communities/ice-secure-communities-memo.pdf](http://www.epic.org/privacy/secure_communities/ice-secure-communities-memo.pdf).

<sup>109</sup> *Menard v. Mitchell*, 328 F. Supp. 718, 722 (D.D.C. 1971) (noting that “control of what arrest or criminal data remain in the [FBI’s] files rests in every case . . . with the local arresting authority”); TASK FORCE ON SECURE COMMUNITIES, *supra* note 96, at 5; CTR. FOR CONSTITUTIONAL RIGHTS, A BRIEFING GUIDE TO THE SECURE COMMUNITIES OCTOBER 2, 2010 “MANDATORY MEMO” (2012), *available at* <http://uncoverthetruth.org/wp-content/uploads/2011/02/Uncover-the-Truth-FOIA-Briefing-Guide-2-17-111.pdf>.

immigration-related decisions for which DHS needs that information. Other provisions in the same statute direct the President to place limits on the use and dissemination of the information shared by federal law enforcement agencies with immigration officials, including mechanisms “to ensure that such information is used *solely* to determine whether to issue a visa to an alien or to determine the admissibility or deportability of an alien to the United States” and “to protect any privacy rights of individuals who are subjects of such information.”<sup>110</sup> While these provisions specify no programmatic details, they do indicate that Congress appropriately intended for information sharing to be carefully limited—quite possibly only for purposes of discrete, pending, immigration-related decisions involving particular individuals.

### *C. Informational End Runs and the Eroding Boundaries of Immigration Federalism*

Automated immigration policing has enabled massive levels of state and local involvement in immigration enforcement that could never have been achieved under earlier programs. The NCIC Immigration Violators File, for example, now makes over 298,900 records of potentially deportable individuals accessible to state and local police nationwide.<sup>111</sup> Under Secure Communities, over twenty-eight million sets of fingerprints have been transmitted to DHS since the program’s inception—“thousands” of fingerprints per day, according to one official, including fingerprints of all individuals born outside the United States or whose place of birth is unknown—from which DHS has identified over 1.4 million matching records in IDENT. ICE has returned or formally removed 279,482 of these individuals, with the number of removals attributable to Secure Communities jumping from 14,364 in 2009, representing four percent of all removals, to 83,815 in 2012, representing one-fifth of all removals.<sup>112</sup> In light of these numbers, the Obama Administration has decreased its reliance on task force agreements under the 287(g) program, one of the cornerstones of the previous generation of federal immigration policing initiatives.

In order to achieve these numbers, these initiatives have forcefully challenged and eroded the equilibrium on immigration federalism that has been emerging in recent years, illustrating the powerful ways in which the technological architecture of federalism itself can shape and govern the

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<sup>110</sup> 8 U.S.C. § 1721(c)(3) (emphasis added).

<sup>111</sup> ICE, *Law Enforcement Support Center*, *supra* note 50; NAT’L CRIME INFO. CTR., IMMIGRATION VIOLATORS FILE, *supra* note 90, § 1.2.

<sup>112</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: MONTHLY STATISTICS THROUGH MAY 31, 2013, at 2 (2013), available at [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interop\\_stats-fy2013-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2013-to-date.pdf); Lasch, *supra* note 51, at 287–88; Greg Slabodkin, *Mocny: US-VISIT Biometric Tech Becoming World Standard*, FIERCEGOVERNMENTIT (Feb. 19, 2003), <http://www.fiercegovernmentit.com/story/mocny-us-visit-biometric-tech-becoming-world-standard/2013-02-19>.

institutional relationships among different levels of government.<sup>113</sup> While sharing with its predecessors the goal of reducing the federal government's information deficit vis-à-vis states and localities in the identification of potentially deportable noncitizens, automated immigration policing departs from those earlier initiatives by precluding states and localities from making affirmative, calibrated, and negotiated choices about the level of immigration policing assistance they wish to furnish. Instead, these initiatives—while nominally still tethered to “voluntary” forms of federal–state cooperation—affect informational end runs around those choices through the use of technology. Both programs tightly weave immigration policing mechanisms into established, deeply ingrained systems designed to facilitate criminal investigation, prosecution, and sentencing—transforming the process of monitoring and verifying immigration status into a routine, seamless part of virtually all ordinary law enforcement encounters with members of the public.

This approach erodes the conception of immigration federalism that has emerged in recent years by narrowing the space for states and localities to make affirmative choices concerning their cooperation on immigration policing that are independent from other decisions—initially made decades earlier—to exchange identification and criminal history records for wholly separate criminal justice purposes. With the NCIC, given the manner of its extensive use by state and local police, the inclusion of immigration records means that individual police officers will automatically receive immigration status information when making routine queries, even if their jurisdictions have policies—which are likely immune from preemption—prohibiting or restricting officers from collecting that information from members of the public they encounter. Once presented with that information, police officers may then be induced to detain or arrest suspected civil or criminal immigration law violators without regard to their formal immigration arrest authority, which *Arizona v. United States* now clarifies to be highly constrained, or the extent to which their jurisdictions have affirmatively chosen to cooperate with ICE.<sup>114</sup>

Secure Communities goes even further, inducing and routinizing the assistance of state and local police *en masse*. Here, the informational end run

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<sup>113</sup> LAWRENCE LESSIG, CODE: VERSION 2.0, at 23–24, 124–25, 282–83 (2006) (noting that ability to regulate cyberspace is influenced by the design of its technological architecture, and that “some architectures are more regulable than others”); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 554 (1998) (examining ways that “[t]echnological capabilities and system design choices impose rules on participants” in information network infrastructures); see *supra* Part II.C.

<sup>114</sup> One police chief, for example, stated that he “wished the [immigration] warrants weren’t in the [NCIC] database but couldn’t ask his officers to ignore them.” Miranda Spivack & Ernesto Londoño, *Challenges to Police Chief on Immigration Warrants*, WASH. POST, June 28, 2007, at T03; see Sullivan, *supra* note 76, at 588–91; Wishnie, *supra* note 21, at 1086–87; see also Mary Cheh, *Threading the Needle: Constitutional Ways for Local Governments to Refuse Cooperation with Civil Immigration Policies*, 16 UDC/DCSL L. REV. 123, 138–39 (2012).

proceeds in the opposite direction from the flow of information using the NCIC. Rather than sending immigration status information to law enforcement officials, DHS automatically extracts identification and criminal history information from state and local law enforcement agencies when they routinely transmit that information to the FBI for purposes that are unrelated to civil immigration enforcement, but understood as essential for criminal law enforcement.<sup>115</sup> DHS then uses that information for immigration enforcement purposes—without regard to whether those jurisdictions have affirmatively chosen to cooperate with federal immigration authorities in helping to identify potentially deportable individuals whom they encounter.

While technology—being “plastic,” as Lawrence Lessig has emphasized—likely could be designed to preserve the room for state and local choices that existing federal immigration policing initiatives contemplate, these new automated immigration policing initiatives are early components in a broader federal strategy that instead appears poised not simply to erode existing conceptions of immigration federalism even further, but to expand these surveillance mechanisms to encompass even larger numbers of U.S. citizens.<sup>116</sup> Federal officials have championed Secure Communities not just as an immigration policing program, but as the first phase of the FBI’s Next Generation Identification (NGI) initiative, a biometric database system intended to upgrade and replace IAFIS, which will enable the collection, storage, processing, and exchange of unparalleled quantities of biometric and biographic information of both U.S. citizens and noncitizens alike.<sup>117</sup> The scope of NGI’s database system is enormous, encompassing multimodal biometric records of fingerprints, multiple photographs, iris scans, palm prints, voice data, and potentially other biometric identifiers along with detailed biographical information, and populated with data from a multiplicity of sources—including not only law enforcement agencies, but potentially also commercial databases, security cameras, publicly available sources, social networking platforms, private employers, and individuals. Using powerful facial recognition and search tools, NGI not only enables more sophisticated means of immediately identifying particular individuals, but also makes it “trivially easy” to locate, identify, and track individuals remotely for investigative, intelligence gathering,

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<sup>115</sup> TASK FORCE ON SECURE COMMUNITIES, *supra* note 96, at 11 (“[F]rom a practical standpoint, local police have no choice but to . . . forward[] arrestees’ fingerprints to the FBI in order to obtain information that is critically important for crime-fighting purposes.” (emphasis omitted)); Verini, *supra* note 12, at 6 (characterizing Secure Communities as enabling ICE to “cut out the middleman of local law enforcement and [get] right to criminal records”).

<sup>116</sup> See LESSIG, *supra* note 113, at 30.

<sup>117</sup> Tana Ganeva, *5 Things You Should Know About the FBI’s Massive New Biometric Database*, ALTERNET (Jan. 8, 2012), [http://www.alternet.org/story/153664/5\\_things\\_you\\_should\\_know\\_about\\_the\\_fbi’s\\_massive\\_new\\_biometric\\_database](http://www.alternet.org/story/153664/5_things_you_should_know_about_the_fbi’s_massive_new_biometric_database); see LYNCH, *supra* note 15, at 10; Ellen Nakashima, *FBI Prepares Vast Database of Biometrics*, WASH. POST, Dec. 22, 2007, at A1.

or preventive purposes.<sup>118</sup> To the extent that DHS stores the fingerprints of U.S. citizens collected under Secure Communities, as discussed above, the implications of Secure Communities for U.S. citizens will become even more consequential under NGI and any other programs that might involve broader sharing of those fingerprints and other biometrics along with any personal information that may be linked to those biometric records.

The comprehensive immigration reform bill recently adopted by the Senate also proposes to use technology in a manner that promises to reshape existing conceptions of immigration federalism. The bill would require employers to verify employees' identities against DHS databases using an enhanced version of E-Verify, DHS's existing online employment eligibility verification system, which incorporates a "photo tool" containing photos and personal information drawn from state driver's license and identification bureaus.<sup>119</sup> With all of these automated initiatives, the manner in which information from different database systems and regulatory domains is routinely aggregated and exchanged blurs the lines between immigration control and other regulatory domains, on the one hand, and the institutional lines between federal, state, and local institutions, on the other.<sup>120</sup>

#### IV. A TECHNOLOGY-, SURVEILLANCE-, AND PRIVACY-BASED ASSESSMENT OF AUTOMATED IMMIGRATION POLICING

As the relationship between Secure Communities and NGI suggests, automated immigration policing emerges from a broader set of developments—extending beyond immigration policy itself—concerning the role of technology, surveillance, and information sharing in contemporary governance.<sup>121</sup> In this Part, I situate and analyze these initiatives within this broader context, in order to highlight consequences of automation that have not necessarily gone unnoticed, but may be better understood when contextualized and more closely examined. First, I assess the hazards arising from the inherent fallibilities of automation, both technological and human—hazards that are exacerbated in the

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<sup>118</sup> Jennifer Lynch, *FBI Ramps Up Next Generation ID Roll-Out—Will You End Up in the Database?*, EFF DEEPLINKS (Oct. 19, 2011), <http://www.eff.org/deeplinks/2011/10/fbi-ramps-its-next-generation-identification-roll-out-winter-will-your-image-end>; Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 440–51 (2012).

<sup>119</sup> Border Security, Economic Opportunity and Immigration Modernization Act, S. 744, 113th Cong. § 3101(a) (as passed by Senate, June 27, 2013); David Kravets, *Biometric Database of All Adult Americans Hidden in Immigration Reform*, WIRED (May 10, 2013), <http://www.wired.com/threatlevel/2013/05/immigration-reform-dossiers>; see Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L.J. 1475, 1509–28 (2013).

<sup>120</sup> See Donohue, *supra* note 118, at 440 (discussing ways that "federalization of local information" in remote biometric identification systems such as NGI "blur[s] the line between law enforcement and national security" and "impacts the relationship of local and state authorities to the federal government").

<sup>121</sup> See generally Balkin, *supra* note 18; MARX, *supra* note 18, at 206–33.

immigration enforcement context by the heightened vulnerability of potentially deportable noncitizens and the limited protections afforded in removal proceedings. Second, I highlight the central place of “function creep” in these initiatives—the deployment of surveillance mechanisms initially implemented for very different purposes—and the potential consequences of further expansions in their use. Third, I examine the intergovernmental conflicts over information control that arise from these initiatives. Finally, I analyze the everyday effects of these surveillance initiatives on both the individuals and communities being monitored and the institutions doing the monitoring.

### A. *The Perils of Automation*

Just as there is nothing inherently harmful about surveillance as such, the implementation of technology-based mechanisms to facilitate immigration policing is also not inherently or necessarily harmful as a categorical matter.<sup>122</sup> Without question, automation and semi-automation can make government processes more efficient and effective.<sup>123</sup> For example, as proponents of Secure Communities argue, by seeking to eliminate discretionary law enforcement determinations concerning whose immigration status should be investigated and verified, automated immigration policing initiatives could, at least theoretically, reduce the incidence of errors based on the lack of knowledge of immigration law among state and local police or invidious exercises of that discretion on the basis of race or ethnicity—both of which are common objections to both unilateral state and local immigration policing initiatives and cooperative federal enforcement programs such as Section 287(g) that automated policing immigration initiatives seek to replace.<sup>124</sup>

At the same time, automation and semi-automation also present significant risks of their own. Studies indicate that decisionmaking when using computerized systems can be distorted by automation complacency and automation bias, related phenomena in which individuals place too much trust in the proper functioning of automated systems even when they suspect error or

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<sup>122</sup> See, e.g., LYON, *supra* note 17, at 162 (emphasizing that surveillance is not a purely “sinister or socially negative phenomenon,” but also can “facilitate entitlement, efficiency, convenience, or security” even when it has “sinister or suspect sides”).

<sup>123</sup> Citron, *supra* note 13, at 1263–67 (discussing and categorizing types of automated systems in government programs).

<sup>124</sup> Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1344–46 (2012) (arguing that Secure Communities’s “more constrained” delegation “eliminates the need for local officials to have any knowledge about immigration law” and “almost certainly produce[s] fewer errors” than previous immigration policing initiatives); see Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1669 (2008) (arguing that government decisionmakers should have greater access to “relevant information about individuals . . . so that [they] can rely more heavily on that relevant information and decrease their reliance on less relevant but more easily observable proxies, such as racial or ethnic status, gender, or age”).

malfunction. When these phenomena are at work, individuals may regard these systems as resistant to error, fail to sufficiently monitor their operation, or overtrust the answers, recommendations, and cues they provide.<sup>125</sup> The resulting harms can be particularly great with complex, interoperable database systems, which often contain inaccurate information and whose proper utilization and maintenance can be challenging. FBI policy, for example, emphasizes that a positive NCIC response does not give an officer probable cause, and that the officer must verify its accuracy and reliability with the agency that originally entered the record before taking action.<sup>126</sup> But despite these admonitions, deprivations of liberty due to inaccurate records accessed through the NCIC, as well as through other law enforcement databases, remain common.<sup>127</sup>

Immigration agencies' poor track record with data quality and management gives ample basis for these concerns in the context of automated immigration policing. Fair information principles emphasize that personal data in government databases should be accurate, complete, and current.<sup>128</sup> However, for decades, immigration authorities have been criticized for maintaining unreliable and inaccurate records and inadequately managing their information systems.<sup>129</sup> A 2005 study, for example, found that as many as forty-two percent

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<sup>125</sup> Citron, *supra* note 13, at 1271–72 (discussing literature). See generally Raja Parasuraman & Dietrich H. Manzey, *Complacency and Bias in Human Use of Automation: An Attentional Integration*, 52 HUM. FACTORS 381 (2010); Kate Goddard et al., *Automation Bias: A Systematic Review of Frequency, Effect Mediators, and Mitigators*, 19 J. AM. MED. INFORMATICS ASS'N 121 (2012).

<sup>126</sup> FBI, *National Crime Information Center*, *supra* note 77.

<sup>127</sup> *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1512 (2012); *Arizona v. Evans*, 514 U.S. 1, 27–29 (Ginsburg, J., dissenting); *United States v. Esquivel-Rios*, No. 12-3141, 2013 WL 3958372 (10th Cir. Aug. 2, 2013); see Teresa A. Miller, *Bright Lines, Black Bodies: The Florence Strip Search Case and Its Dire Repercussions*, 46 AKRON L. REV. 433, 459 (2013); DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 46–47 (2004); Erin Murphy, *Databases, Doctrine, and Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 825 (2010). Similar concerns are presented by other government database systems. MARC R. ROSENBLUM, *MIGRATION POLICY INST., E-VERIFY: STRENGTHS, WEAKNESSES, AND PROPOSALS FOR REFORM* (2011); Brief of *Amicus Curiae* Electronic Privacy Information Center (EPIC) et al. in Support of Petitioner, *Herring v. United States*, 555 U.S. 135 (2009) (No. 07-513); Peter Shane, *The Bureaucratic Due Process of Government Watch Lists*, 75 GEO. WASH. L. REV. 804, 811–19 (2007).

<sup>128</sup> Org. for Econ. Co-operation & Dev., *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, ¶ 8, Doc. C(80)58/FINAL (Sept. 23, 1980) [hereinafter OECD Guidelines], available at <http://www.oecd.org/internet/ieconomy/oecdguidelinesonthe protection of privacy and transborder flows of personal data.htm>. See generally Robert Gellman, *Fair Information Practices: A Basic History* (June 24, 2013), <http://bobgellman.com/rg-docs/rg-FIPShistory.pdf>; Omer Tene, *Privacy Law's Midlife Crisis: A Critical Assessment of the Second Wave of Global Privacy Laws*, 74 OHIO ST. L.J. 1217, 1221–22 (2013).

<sup>129</sup> *E.g.*, GAO, *SECURE COMMUNITIES*, *supra* note 11, at 7–9; Deposition of Kerry John Kaufman, taken on June 4, 2013, at 150–60, *Jimenez Moreno v. Napolitano*, No. 11 Civ. 5452 (N.D. Ill. Aug. 11, 2011) [hereinafter Kaufman Deposition]; CAPPS ET AL., *supra* note



of all matches in the NCIC Immigration Violators File in response to police inquiries were false positives, in which DHS could not confirm that the individuals were immigration law violators. More recently, a GAO study found that ICE had no record of the criminal arrest charges for more than half of all individuals removed under Secure Communities during 2011 and the first half of 2012.<sup>130</sup>

Such fallibilities are compounded by increased accessibility of databases across agencies, which can quickly propagate erroneous information far and wide and create greater opportunities for data insecurity and misuse.<sup>131</sup> When ICE investigates individuals flagged under Secure Communities, for example, it relies not only upon its own records but also other databases, including crime-related databases accessible through the NCIC. These systems all have limitations of their own. For example, despite recent improvements, criminal history records often remain inaccurate, inconsistent across states, and incomplete—for example, by lacking final disposition information or failing to record when warrants have been vacated.<sup>132</sup> With other NCIC databases, such as the violent gang offenders and registered sex offenders files, vague and overbroad criteria for inclusion can elide relevant variations among individuals whose records are included.<sup>133</sup>

Nor are the fingerprint identification technologies upon which Secure Communities relies entirely foolproof. Although automated fingerprint identification systems can be extremely accurate in determining identity, they

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57, at 35–36; GLADSTEIN ET AL., *supra* note 21, at 5; DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES 23–31 (2009); *see also* NAT’L IMMIGRATION LAW CTR., INS DATA: THE TRACK RECORD (2003); Schuck & Williams, *supra* note 43, at 427–31, 434, 448–49.

<sup>130</sup> GLADSTEIN ET AL., *supra* note 21, at 5; GAO, SECURE COMMUNITIES, *supra* note 11, at 22–23.

<sup>131</sup> JOHN PALFREY & URS GASSER, INTEROP: THE PROMISE AND PERILS OF HIGHLY INTERCONNECTED SYSTEMS 145 (2012) (noting that with increasing interoperability and connectivity among complex systems, “harm can spread like contagion . . . [without] mechanisms to stop it”); *see also* LYNCH, *supra* note 15, at 9.

<sup>132</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2010, at 208 (2011); ATTORNEY GENERAL’S REPORT, *supra* note 79, at 16–17; *see* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 416–18 (2006); Donald L. Doernberg & Donald H. Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110, 1113 (1980); Mary De Ming Fan, *Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine*, 33 AM. J. CRIM. L. 32, 60–63 (2005).

<sup>133</sup> K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 649–54 (2011); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 9, 44–46 (2007) (discussing concerns that “proliferation of people required to register” for lower level sex offenses “makes it harder for law enforcement to determine which sex offenders warrant careful monitoring”); Jacobs & Crepet, *supra* note 77, at 192–96.

nevertheless can yield inaccurate results, owing to technological limitations, the quality of fingerprint recording processes, and even the particular demographic groups in which the fingerprint subjects are members.<sup>134</sup> According to one estimate, at least ten percent of the population have fingerprints that cannot be read; indeed, it is in part precisely because of the perceived limitations of fingerprints that authorities have sought to use advanced multimodal biometric technologies.<sup>135</sup> Moreover, as discussed above, IDENT is both underinclusive and grossly overinclusive as a database against which to match records of individuals who might be deportable.<sup>136</sup>

These risks might be more tolerable if database screening were merely one early step in a fuller investigative process.<sup>137</sup> Indeed, even if it were hypothetically possible for database systems and biometric technologies to be perfectly accurate, consistent, and complete, well-functioning interoperability processes would still depend on competent and effective “human and institutional layers.”<sup>138</sup> With Secure Communities, for example, flagging an individual’s record is only step one in determining whether to issue a detainer. Officials must also ascertain the individual’s criminal history and whether the individual is potentially subject to a deportability ground. Even when an individual is deemed potentially deportable, officials must also determine whether the individual falls within the agency’s enforcement priorities and how to exercise its prosecutorial discretion. Given the intricacies of the deportability grounds and their surrounding jurisprudence, these determinations can be remarkably complex, requiring information from multiple sources, knowledge of applicable law, and difficult judgment calls.<sup>139</sup>

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<sup>134</sup> SHOSHANA AMIELLE MAGNET, *WHEN BIOMETRICS FAIL: GENDER, RACE, AND THE TECHNOLOGY OF IDENTITY* (2011); SIMON A. COLE, *SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION* 254–58 (2001); A. MICHAEL FROOMKIN & JONATHAN WEINBERG, *HARD TO BELIEVE: THE HIGH COST OF A BIOMETRIC IDENTITY CARD* (2012).

<sup>135</sup> Donohue, *supra* note 118, at 442. Multimodal biometric identifiers come with limitations of their own. LYNCH, *supra* note 15, at 10–11; SIMSON GARFINKEL, *DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY* 37–67 (2000); MAGNET, *supra* note 134; Hu, *supra* note 119, at 1534–41.

<sup>136</sup> As discussed above, individuals are flagged under Secure Communities even when their fingerprints do *not* match any IDENT record if they have an unknown or non-U.S. place of birth. *See supra* notes 99–103 and accompanying text.

<sup>137</sup> Schuck, *supra* note 67, at 76 (suggesting that high error rates in NCIC IVF might not be “unacceptably” high if databases are used “only [as] a necessarily crude, first-step screening technique, not a decision to prosecute or even to investigate particular individuals,” and if “inaccuracies that arise in early [investigative] steps are weeded out in later ones”).

<sup>138</sup> PALFREY & GASSER, *supra* note 131, at 39–53; *see* JOSEPH N. PATO & LYNETTE I. MILLETT, *BIOMETRIC RECOGNITION: CHALLENGES AND OPPORTUNITIES* 19–20 (2010) (“Even the simplest, most automated, accurate, and isolated biometric application is embedded in a larger system.”); Murphy, *supra* note 127, at 825.

<sup>139</sup> Cox & Miles, *supra* note 12, at 95–96; Memorandum from Janet Napolitano, U.S. Sec’y of Homeland Sec., *Exercising Prosecutorial Discretion with Respect to Individuals*

However, the very design of Secure Communities leaves limited space for these human and institutional layers to function carefully and effectively—and the potential harms that can result are greatly exacerbated by the heightened vulnerabilities and limited protections afforded to noncitizens facing the immigration enforcement and removal process. Given ICE's goal of lodging detainees while individuals are still in post-arrest police custody, the pressure to make determinations rapidly can reinforce automation-related biases in favor of making those decisions based largely or exclusively upon review of criminal history and other database systems—which may preclude, among other things, factoring in equities that warrant the exercise of prosecutorial discretion. These pressures are exacerbated by the massive scale of the program, which strains agency resources and—as seen in other aspects of the removal process taxed by mass enforcement practices—can undermine the quality of decisionmaking. While current plans for greater automation might help cope with these pressures, further automation itself introduces other risks, as discussed above.<sup>140</sup>

Several of these hazards are illustrated by the case of James Makowski, who naturalized through his adoptive U.S. citizen parents after his adoption from India as an infant in 1987.<sup>141</sup> Following Makowski's arrest and guilty plea to a felony drug offense in 2010, the judge recommended an alternative sentence in a drug treatment “boot camp,” instead of the seven-year prison

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*Who Came to the United States as Children* (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; see *Padilla v. Kentucky*, 559 U.S. 356, 377–78 (2010) (Alito, J., concurring) (noting that “whether a conviction for a particular offense will make an alien removable is often quite complex,” and that criminal lawyers “who consult[] a guidebook” to make that determination “will often find that the answer is not ‘easily ascertained’”).

<sup>140</sup> Kaufman Deposition, *supra* note 129, at 44–47, 58, 91–92, 141–49, 208–13 (discussing circumstances under which ICE issues detainees for individuals identified under Secure Communities without interviewing the individual or conducting further investigation beyond its review of government databases); Palmatier Declaration, *supra* note 52, ¶¶ 14, 18 (discussing increases in LESC's workloads and processing times due to Secure Communities, given larger number of inquiries and “need for complex queries” of databases); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 595 (2009); cf. HUMAN RIGHTS FIRST, *JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW* 29 (2011) (in context of immigration detention, noting that standardized risk assessment “is a management tool—not a substitute for independent review of the need to detain”); see also Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1104–07 (2002).

<sup>141</sup> Brian Bennett, *Suit Filed in Wrongful Detainment*, CHI. TRIB., July 6, 2012, at 10; Chip Mitchell, *Immigration Enforcement Program Faces Novel Suit*, WBEZ (July 4, 2012), <http://www.wbez.org/news/immigration-enforcement-program-faces-novel-suit-100646>.

sentence the charge ordinarily carries. However, when Makowski appeared for that program, he was deemed ineligible because ICE had issued a detainer—without notice to Makowski and allegedly without any investigation beyond its review of government databases—after he was flagged under Secure Communities upon his initial arrest. While Makowski possessed a U.S. passport and Social Security number since childhood, lived continuously in the United States since his adoption, and had served in the U.S. Marine Corps after undergoing an FBI background check, ICE did not rescind the detainer for two months—during which Makowski was incarcerated in a maximum security prison. Once Makowski’s lawyer persuaded ICE to withdraw the detainer, Makowski entered and completed the treatment program.<sup>142</sup>

Makowski’s case illustrates how technology can increase the costs that are imposed on U.S. citizens and lawfully present noncitizens by mass immigration enforcement practices.<sup>143</sup> Evidence suggests that significant numbers of U.S. citizens are placed at risk of being wrongfully detained and even deported each year, including many individuals flagged under Secure Communities.<sup>144</sup> In other instances, noncitizens apprehended under the program might not be deportable at all or might have strong equities in favor of discretion or claims for relief that are not evident from ICE’s database review.<sup>145</sup> Even if such issues might subsequently be resolved, in the meantime these individuals may face severe deprivations, including detention, simply by virtue of having been investigated or charged. While wrongful deprivations in the removal process are not by any means new, just as Secure Communities expands and accelerates ICE’s ability to identify and apprehend potentially deportable noncitizens, it

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<sup>142</sup> Makowski’s lawsuit against federal officials under the Privacy Act is pending. First Amended Complaint, *supra* note 101.

<sup>143</sup> A parallel set of concerns arises under the E-Verify employment verification system. See generally Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (And Why They Should)*, 2 U.C. IRVINE L. REV. 381 (2012).

<sup>144</sup> KOHLI ET AL., *supra* note 14, at 2; Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 606 (2011); Paul McEnroe, *U.S. Citizenship No Defense Against Deportation Threat*, MINNEAPOLIS STAR-TRIB., Nov. 27, 2011, at A1; Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES, Dec. 14, 2011, at A20; Yana Kunichoff, *Why Were More Than 800 US Citizens Flagged for Possible Deportation by Immigration Authorities?*, CHI. REP. (Apr. 12, 2013), <http://www.chicagoreporter.com/blogs/why-were-more-800-us-citizens-flagged-possible-deportation-immigration-authorities>. Individuals who automatically derive U.S. citizenship from their parents as children are particularly vulnerable to these risks, since no documentary record of their U.S. citizenship status may exist at all unless they formally apply for a certificate of citizenship or a U.S. passport. 8 U.S.C. § 1431 (2012); Margaret D. Stock, *Citizenship and Computers*, 15 BENDER’S IMMIGR. BULL. 1143, 1143 (2010).

<sup>145</sup> AGUILASOCHO ET AL., *supra* note 14, at 9–12; see Deposition of Philip T. Miller, taken on June 6, 2013 at 49–50, *Jimenez Moreno v. Napolitano*, No. 11 Civ. 5452 (N.D. Ill. 2011) [hereinafter Miller Deposition] (conceding that ICE has a general practice of issuing detainers against lawful permanent residents who have been charged but not yet convicted of deportable offenses).

simultaneously amplifies the consequences of mistakes along the way. Given the program's enormous scale, even small error rates can lead to large numbers of improper deprivations.

In short, the combination of database errors, automation bias, complex but time-pressured decisionmaking, massive volumes of inquiries, and fragmented responsibilities among different immigration agencies can easily yield circumstances in which immigration agencies rush to issue detainers first, and ask questions either later or never.<sup>146</sup> Closer empirical research on immigration agency enforcement processes certainly would help illuminate whether that is, in fact, a fair characterization of the outcomes that Secure Communities produces, and while the program has contributed to a tenfold increase in the number of ICE detainers, recently issued guidelines for issuing detainers may shift these outcomes.<sup>147</sup> Nevertheless, at least under recent practices, the limited exercise of discretion by immigration officials at the prosecution and adjudication stages of the removal process makes the moment of arrest critical—the “discretion that matters,” as Hiroshi Motomura explains—in affecting whether an individual ultimately is removed.<sup>148</sup> Especially given the limited procedural protections and access to counsel afforded to noncitizens facing removal proceedings, particularly for individuals in detention, the consequences of database errors and other fallibilities of automation at the initial stages of the removal process can be difficult to correct and remedy once the agency has acted upon them.<sup>149</sup>

### B. *Function Creep and Immigration Panopticism*

Surveillance and privacy scholars have long been preoccupied with surveillance or function creep: the gradual and sometimes imperceptible expansion of surveillance mechanisms, once in place, for uses beyond those

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<sup>146</sup> Lasch, *supra* note 54, at 179 (“It appears that ICE lodges detainers indiscriminately, regardless of the criminal charges an alien is facing.”).

<sup>147</sup> Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems* (Dec. 21, 2012), available at <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>; MEISSNER ET AL., *supra* note 9, at 110; Lasch, *supra* note 51, at 303–04. *But see* TRAC IMMIGRATION, NEW ICE DETAINER GUIDELINES HAVE LITTLE IMPACT (Oct. 1, 2013), <http://trac.syr.edu/immigration/reports/333> (concluding that “so far . . . the new detainer policy has had no discernible impact in terms of improving the practice of targeting ICE detainers in the field”).

<sup>148</sup> Motomura, *supra* note 14, at 1850–58; KOHLI ET AL., *supra* note 14, at 2 (concluding, based on analysis of government data, that under Secure Communities “individuals are pushed through rapidly, without appropriate checks or opportunities to challenge their detention and/or deportation”).

<sup>149</sup> *Developments in the Law*, *supra* note 49, at 1658–82; Kalhan, *supra* note 22, at 48–49; see also Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 503–19, 527–37 (2013).

originally intended or contemplated.<sup>150</sup> A lengthy list of examples illustrates the phenomenon—the proliferation of surveillance camera systems to police a widening array of low level criminal and noncriminal offenses,<sup>151</sup> the expanding use of online tracking,<sup>152</sup> the use of census data and voter lists to facilitate targeting of disfavored individuals or groups,<sup>153</sup> the expansion of DNA databases maintained by law enforcement to encompass rapidly widening categories of individuals and purposes,<sup>154</sup> and the repurposing of identity documents and identification systems of every stripe,<sup>155</sup> to take just a handful. Surveillance practices undertaken in the aftermath of the 2001 terrorist attacks have routinely morphed beyond the scope of their original antiterrorism purposes. For example, the “fusion centers” established during the past decade to collect, analyze, and exchange terrorism-related intelligence information

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<sup>150</sup> See Richard V. Ericson & Kevin D. Haggerty, *The New Politics of Surveillance and Visibility*, in *THE NEW POLITICS OF SURVEILLANCE AND VISIBILITY* 3, 18–19 (Richard V. Ericson & Kevin D. Haggerty eds., 2006) (describing “function creep” as “one of the most important operational dynamics of contemporary surveillance”); LESSIG, *supra* note 113, at 210 (“Systems of surveillance are instituted for one reason; they get used for another.”); Gary T. Marx, *Seeing Hazily (But Not Darkly) Through the Lens: Some Recent Empirical Studies of Surveillance Technologies*, 30 LAW & SOC. INQUIRY 339, 385–87 (2005); John Shattuck, *In the Shadow of 1984: National Identification Systems, Computer-Matching, and Privacy in the United States*, 35 HASTINGS L.J. 991, 1000 (1984) (suggesting, as a “clear trend,” that “computerized data systems . . . have always been adapted to purposes other than their originally intended use”). Cf. Gus Hosein & Caroline Wilson Palow, *Modern Safeguards for Modern Surveillance: An Analysis of Innovations in Communications Surveillance Techniques*, 74 OHIO ST. L.J. 1071, 1076, 1080–83 (2013) (discussing how the absence of “resource limitations” in new communications surveillance technologies enables “less targeted approaches to communications surveillance” on a much larger scale than previously had been possible).

<sup>151</sup> William Webster, *CCTV Policy in the UK: Reconsidering the Evidence Base*, 6 SURVEILLANCE & SOC’Y 10 (2009).

<sup>152</sup> GILLIOM & MONAHAN, *supra* note 17, at 55–63.

<sup>153</sup> David Lyon, *Identification, Surveillance and Democracy*, in SURVEILLANCE AND DEMOCRACY 34 (Kevin D. Haggerty & Minas Samatas eds., 2010); William Seltzer & Margo Anderson, *The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses*, 68 SOC. RES. 481 (2001).

<sup>154</sup> Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES, June 13, 2013, at A1; Barry Steinhardt, *Privacy and Forensic DNA Data Banks*, in DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE 173, 174–75 (David Lazer ed., 2004).

<sup>155</sup> DAVID LYON, IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE 19–38 (2009); BRENNAN CTR. FOR JUSTICE, RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM (2005) (criticizing proposal to expand use of biometric drivers’ licenses and ID cards required by REAL ID Act as a mandatory form of voter identification); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1402 (2001).

among law enforcement agencies almost immediately, and unapologetically, expanded the scope of their activities to encompass ordinary crimes.<sup>156</sup>

Database systems can be particularly susceptible to function creep. While fair information principles urge limits on the secondary use of information for purposes not specified when collected, in practice these constraints are limited—especially given the lengthy data retention periods in many of these systems, which are often themselves extended as a result of function creep.<sup>157</sup> For example, especially as the politics of crime control has spilled into institutions such as the workplace, and as “collateral” consequences of criminal proceedings have steadily increased, criminal records database systems have increasingly been made accessible for a widening array of noncriminal purposes—including background checks for employment, licensing and permitting, housing, public assistance, and gun purchases.<sup>158</sup> In the wake of the 2001 terrorist attacks, the categories of noncriminal background checks authorized by law have grown further. Fingerprint submissions to the FBI for noncriminal background checks now exceed submissions by law enforcement agencies for criminal justice purposes.<sup>159</sup>

The expanded use of these same database systems for automated immigration policing—and the possibility of still further expansion—can be

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<sup>156</sup> U.S. SENATE PERM. SUBCOMM. ON INVESTIGATIONS, FEDERAL SUPPORT FOR AND INVOLVEMENT IN STATE AND LOCAL FUSION CENTERS (2012); Torin Monahan & Priscilla M. Regan, *Zones of Opacity: Data Fusion in Post-9/11 Security Organizations*, 27 CAN. J.L. & SOC’Y 301, 303 (2012); Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1463–64 (2011).

<sup>157</sup> OECD Guidelines, *supra* note 128, ¶¶ 9–10; Solove, *supra* note 18, at 520–22; see Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 496–99 (1995); MARX, *supra* note 18, at 209–11; Christopher Soghoian, *The Spies We Trust: Third Party Service Providers and Law Enforcement Surveillance* 55–56 (July 15, 2012) (unpublished Ph.D. dissertation, Indiana University), available at <http://cis-india.org/inter-net-governance/spies-we-trust>; see also A. Michael Froomkin, “PETs Must Be on a Leash”: How U.S. Law (and Industry Practice) Often Undermines and Even Forbids Valuable Privacy Enhancing Technology, 74 OHIO ST. L.J. 965, 977–78 (2013) (discussing legislative proposal by Obama Administration to mandate wider data retention by telecommunications providers in order to facilitate law enforcement surveillance and investigative activities).

<sup>158</sup> J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 44–46 (2009); SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA 4–6 (2005); JONATHAN SIMON, GOVERNING THROUGH CRIME 207–57 (2007); Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. (forthcoming 2014) (manuscript at 11–24) (on file with author); ATTORNEY GENERAL’S REPORT, *supra* note 79, at 15–16; see Marx, *supra* note 150, at 386.

<sup>159</sup> ATTORNEY GENERAL’S REPORT, *supra* note 79, at 15–16; BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: 2002 OVERVIEW 9–14 (2003) [hereinafter COMPENDIUM OF STATE PRIVACY LEGISLATION]; Jacobs & Crepet, *supra* note 77, at 203–10.

understood in similar terms. As discussed above, the widening of the NCIC's scope to include civil immigration records came not only in the wake of the 2001 terrorist attacks, but also on the heels of several other categories of noncriminal records being added to the NCIC—including limited categories of immigration records—which extended the system's use beyond its original criminal justice and law enforcement purposes. Moreover, the addition to the NCIC of some categories of immigration records has opened the door to proposals that would add others—not for the antiterrorism purposes used to justify the most recent two categories, but more broadly for garden-variety immigration policing. A bill that recently passed the House Judiciary Committee, for example, proposes to add large numbers of records to the NCIC on additional categories of suspected immigration law violators.<sup>160</sup> If enacted, the proposal would make many more immigration records widely accessible to police officers nationwide, thereby placing even greater pressures upon the conception of immigration federalism that has emerged in recent years.

Similarly, Secure Communities takes the processes and systems developed for the collection and exchange of fingerprints and criminal history records for criminal justice purposes and shares those same records with DHS officials for wholly distinct civil immigration enforcement purposes. Not only has Secure Communities repurposed the biometric records already maintained by the FBI, but in addition, as with programs ranging from DNA collection to public health surveillance, the program has contributed to the dramatic expansion of DHS's own biometric collection practices, which now include the collection of fingerprints and other biometric data from almost all noncitizens who have contact with the agency—largely for potential future uses of that data, rather than for any immediate purposes.<sup>161</sup>

In this context, questions about secondary uses for the data and infrastructure of automated immigration policing—and the constraints to be placed on such expansions—warrant greater consideration. As the National Immigration Law Center has noted, it remains unclear “how far-reaching the fingerprint-sharing between DHS and DOJ will be”:

Will the fingerprints of teachers applying for jobs be checked against DHS databases? Will the fingerprints of immigrant attorneys who wish to take the bar examination be stored in case they later have contact with the police? Will

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<sup>160</sup> Strengthen and Fortify Enforcement Act, H.R. 2278, 113th Cong. § 103 (2013); see Kalhan, *supra* note 57, at 17–18.

<sup>161</sup> LYNCH, *supra* note 15, at 10; Wendy K. Mariner, *Mission Creep: Public Health Surveillance and Medical Privacy*, 87 B.U. L. REV. 347, 384 (2007) (noting, in context of public health surveillance, that while courts have focused on initial collection of data, “it is the subsequent release of information to other public agencies and private entities that dominates the structure of many current surveillance programs”); JONATHAN FINN, CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY 98–102 (2009).



mobile fingerprint scanners be used to match fingerprints against DHS databases, so that taking a person into custody will not even be required?<sup>162</sup>

The potential expansion of these database systems in these or other directions not only echoes past experiences with the proliferating noncriminal uses of criminal history records, but also would be entirely consistent with the trajectory in recent decades of immigration control more generally. While varying in their approaches, the interior immigration enforcement initiatives that have emerged in recent years all seek to establish, crudely speaking, a kind of immigration panopticism, which eliminates zones in society where immigration status is invisible and irrelevant and puts large numbers of public and private actors—including law enforcement and criminal justice officials, but also welfare agencies, public hospitals and health agencies, motor vehicle licensing agencies, private employers, private landlords, and potentially others—in the position of monitoring and determining immigration status, identifying potential immigration law violators, collecting personal information from those individuals, and informing federal authorities. While hoping that these initiatives might increase the number of individuals who are deported, proponents of these initiatives have long placed greater emphasis on what they characterize, in a term now made famous by Mitt Romney, as a process of “self-deportation,” by which deportable noncitizens are essentially disciplined into internalizing the perception that their immigration status is constantly being monitored and, ultimately, into both revealing their status in a range of day-to-day settings and conforming to social expectations that they depart the country.<sup>163</sup>

With database systems becoming increasingly interoperable—giving rise to broader assemblages that can “integrate and coordinate otherwise discrete surveillance regimes, either in temporary configurations or in more stable structures”—the expanded use of the information and systems accessed through initiatives like Secure Communities would create far-reaching possibilities to extend the reach of that disciplinary process of “self-deportation.”<sup>164</sup> The use of

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<sup>162</sup> NILC, *supra* note 14.

<sup>163</sup> Kalhan, *supra* note 1, at 1165–67; Amy Gardner & Rosalind S. Helderman, *Gingrich Mocks Romney’s “Self-Deportation” Plan for Illegal Immigrants*, WASH. POST, Jan. 25, 2012, [http://articles.washingtonpost.com/2012-01-25/politics/35440222\\_1\\_cayman-island-accounts-illegal-immigrants-obama-level-fantasy](http://articles.washingtonpost.com/2012-01-25/politics/35440222_1_cayman-island-accounts-illegal-immigrants-obama-level-fantasy); MARK KRIKORIAN, CTR. FOR IMMIGRATION STUDIES, DOWNSIZING ILLEGAL IMMIGRATION: A STRATEGY OF ATTRITION THROUGH ENFORCEMENT 3 (2005); see Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297, 317–20 (2003); MARX, *supra* note 18, at 218–19; MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977). On the limits of the panopticon as a metaphor, see Kevin D. Haggerty & Richard V. Ericson, *The Surveillant Assemblage*, 51 BRIT. J. SOC. 605, 607–08 (2000); LYON, *supra* note 17, at 56–62; Marx, *supra* note 150, at 368–72.

<sup>164</sup> Kevin D. Haggerty, *Foreword*, in SURVEILLANCE: POWER, PROBLEMS, AND POLITICS ix, xvii (Sean P. Hier & Joshua Greenberg eds., 2009); see Haggerty & Ericson, *supra* note 163, at 610–11.

FBI-maintained identification and criminal history records for immigration control purposes also raises questions about whether immigration authorities might similarly seek access to other databases maintained and held by federal, state, local, and even private entities—using, for example, the NGI initiative—and related questions will soon arise with other technology-based immigration enforcement initiatives, such as E-Verify. However, even as the prospect of ever-widening uses of these systems highlights the importance of addressing those possibilities before particular surveillance mechanisms are widely implemented, the ability to do so can be elusive—particularly when, as with automated immigration policing, those mechanisms have been deployed rapidly, with minimal transparency, under vague legal authority, and subject to limited external constraints.<sup>165</sup>

### C. *Whose Data?*

Closely related to function creep and secondary uses of information in these initiatives are questions concerning control of that information: when states and localities share fingerprints and criminal history records with federal authorities, to what extent do they retain control over the use and dissemination of that information? When personal information is at stake, it is conventional and familiar to analyze privacy in terms of information control.<sup>166</sup> Fair information principles give significant weight to individual control over personal information, and much privacy scholarship explores various means of enabling an appropriate balance between individual control and other interests.<sup>167</sup> While some scholars question the extent to which privacy theory, law, and policy should privilege individual control over personal information, these critics are not necessarily less concerned with questions of information control, even as they ultimately might vest control elsewhere or prioritize individual interests in control differently.<sup>168</sup>

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<sup>165</sup> NILC, *supra* note 14; see Ericson & Haggerty, *supra* note 150, at 18–19 (arguing that function creep is “notoriously difficult to transform into a coherent and successful stakeholder politics”); Marx, *supra* note 150, at 387 (“Asking questions about the process of surveillance creep and possible latent goals should be a central part of any public policy discussion of surveillance *before* it is introduced.”).

<sup>166</sup> Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1109–15 (2002) (describing control over personal information as “[o]ne of the most predominant theories of privacy” and summarizing leading theorists); Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 820 (2000) (describing as “staggering” the consensus behind the conception of privacy “as a personal right to control the use of one’s data”).

<sup>167</sup> OECD Guidelines, *supra* note 128, ¶¶ 10, 13; Gellman, *supra* note 128; see JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 225–28 (2008); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1127, 1130 (2000); Claudia Diaz, Omer Tene & Seda Gürses, *Hero or Villain: The Data Controller in Privacy Law and Technologies*, 74 OHIO ST. L.J. 923 (2013); Froomkin, *supra* note 157.

<sup>168</sup> Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1899–1900 (2013); Anita L. Allen, *Privacy-as-Data Control*:

While typically not characterized as privacy interests, institutions often have analogous interests in control over the information that they collect, create, process, and share.<sup>169</sup> Among these institutions are state and local governments, which collect and maintain large quantities of confidential information concerning activities that they regulate. At times those interests push states and localities in the direction of disclosing that information, as with the commercial sale of personal information in driver's license records that Congress restricted in the 1990s.<sup>170</sup> However, in other instances those institutional interests run in the direction of preventing or limiting dissemination and use of their information. Indeed, state and local interests in preventing disclosure of their records have become a major source of intergovernmental disputes over information control, as states have resisted a growing number of demands by federal agencies or Congress that states provide these records—including tax records, medical marijuana registries, professional disciplinary records, business licenses, vehicle registrations, and property title records—for federal investigative purposes.<sup>171</sup>

Similar information control questions have been at the heart of the conflicts over whether states and localities can “opt out” of Secure Communities. According to one ICE official, the agency internally “never believed the states could totally opt out of Secure Communities” because “the sharing [of fingerprints] was ultimately between the FBI and DHS.”<sup>172</sup> After initially advancing a different position, DHS now has publicly taken this position as well, asserting that “a jurisdiction cannot choose to have the fingerprints it submits to the federal government processed only for criminal history checks.”<sup>173</sup> By this characterization—which ICE also communicated to state governors when it terminated their Secure Communities agreements in 2011—the program does not really involve or implicate states, localities, or federalism

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*Conceptual, Practical, and Moral Limits of the Paradigm*, 32 CONN. L. REV. 861, 862 (2000); Schwartz, *supra* note 166, at 816–17; Paul M. Schwartz & William M. Treanor, *The New Privacy*, 101 MICH. L. REV. 2163, 2164, 2180–84 (2003); *see also* Solove, *supra* note 166, at 1109–15.

<sup>169</sup> Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 1201, 1203 (2000) (noting centrality of information control for both intellectual property holders and individuals who wish to protect privacy); KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 231–47 (1988) (analyzing ways that corporate trade secrecy is akin to privacy).

<sup>170</sup> 18 U.S.C. § 2721 (2012); *see Reno v. Condon*, 528 U.S. 141, 151 (2000) (upholding statute against Tenth Amendment challenge as a law of general applicability).

<sup>171</sup> *See generally* Mikos, *supra* note 66.

<sup>172</sup> Verini, *supra* note 12.

<sup>173</sup> *Secure Communities: Frequently Asked Questions (FAQs)*, ICE, [http://www.ice.gov/secure\\_communities/faq.htm](http://www.ice.gov/secure_communities/faq.htm) (last visited Oct. 2, 2013).

at all, but rather is simply a federal interagency arrangement in which states and localities have no interest or concern.<sup>174</sup>

While this position may be consistent with a broader, decades-long trend toward the routinization of secondary uses of government database systems, it simultaneously suggests a major shift in the FBI's own longstanding approach to its role as custodian of identification and criminal records submitted by states and localities. As stated by the FBI official responsible for IAFIS as recently as 2011:

My database is very rich with [seventy] million bad guys. . . . But we don't own those records. They're owned by the states, by the 18,000 law enforcement agencies across this country. They submit them to us and allow us to use them, we hold them and distribute them per their agreements with each of the states. And every state has a different law governing what records can be distributed and what they can be used for. The challenge is walking that line and making sure we're not violating any of the states' rights in addition [to] the federal laws that we have.<sup>175</sup>

Internal government documents show that other FBI officials have shared this understanding, which is consistent with how the FBI has long characterized ownership of the fingerprint records that it maintains.<sup>176</sup> For example, the FBI long took the categorical position that it had no authority to remove or make changes to records in its possession because those records belonged to state and local governments, not the FBI.<sup>177</sup> Under Secure Communities, the FBI shares

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<sup>174</sup> Letter from John Morton, Dir., U.S. Immigration & Customs Enforcement, to Jack Markell, Governor of Del. (Aug. 5, 2011), *available at* [http://epic.org/privacy/secure\\_communities/SGN.pdf](http://epic.org/privacy/secure_communities/SGN.pdf) ("Once a state or local law enforcement agency voluntarily submits fingerprint data to the federal government, no agreement with the state is legally necessary for one part of the federal government to share it with another part.").

<sup>175</sup> Jared Serbu, *DHS to Gain Real-Time Access to DoD Biometrics*, FED. NEWS RADIO (Mar. 1, 2011, 7:18 AM), <http://www.federalnewsradio.com/697/2289626/DHS-to-gain-real-time-access-to-DoD-biometrics>; *see also* National Crime Prevention and Privacy Compact, 42 U.S.C. § 14616, arts. I(10), V(c) (2006) (providing that automated, "[d]irect access to the [III] by entities other than the FBI and State criminal history records repositories shall not be permitted for noncriminal justice purposes").

<sup>176</sup> Press Release, Nat'l Day Laborers Org. Network et al., *New Documents Show Secure Communities Fuels FBI's Rapidly Expanding Surveillance System While Ignoring States' Concerns* (Nov. 10, 2011), *available at* <http://uncoverthetruth.org/media/press-releases/press-release-new-documents-show-secure-communities-fuels-fbis-rapidly-expanding-surveillance-system-while-ignoring-states-concerns> (quoting FBI official's concern that Secure Communities "use[s] [fingerprint] data in a way the [data] owner explicitly bans," which "could cause the whole CJIS model [of information sharing between the FBI and states and localities] to implode").

<sup>177</sup> FBI, COOPERATION: THE BACKBONE OF EFFECTIVE LAW ENFORCEMENT 12 (1973) (stating that while the FBI is the central repository for fingerprint identification information, "the cards and information contained thereon remain the property of the contributing agency and no changes in the records can be made without that agency's permission"); *Menard v. Saxbe*, 498 F.2d 1017, 1022 (D.C. Cir. 1974) (discussing FBI's "firm policy" that it "does

information with DHS apparently without regard to these underlying agreements with state governments, which thereby reshapes the basic nature of their information sharing. Neither DHS nor the FBI has reconciled or fully explained the tension in these positions; nor does the statutory framework for federal record maintenance and exchange unambiguously resolve that tension.

The roots of this tension may be traced to intergovernmental conflicts over information control dating from the 1890s. With growing use of fingerprints in criminal investigations during that period, state and local law enforcement agencies rapidly developed their own competing, duplicative, and inconsistent fingerprint records systems. These agencies jealously resisted efforts to consolidate those systems in a national registry, explicitly invoking the longstanding tradition of local control of law enforcement.<sup>178</sup> Even after the Department of Justice in 1924 established a national clearinghouse for state and local law enforcement agencies to share fingerprint and criminal records, which ultimately became part of the FBI, this tradition of local control of law enforcement and misgivings at the prospect of a national police force remained strong influences.<sup>179</sup> From the outset, participation in the clearinghouse remained voluntary and negotiated. While J. Edgar Hoover aggressively campaigned to persuade law enforcement agencies to participate, he also at least publicly disclaimed any ambition to turn the FBI into a national police force, regularly extolling the virtues of local control and emphasizing the voluntary and cooperative nature of the FBI's identification and criminal records services.<sup>180</sup>

State and local resistance to centralized criminal recordkeeping resurfaced during the 1970s, when the FBI established a comprehensive criminal history database within the NCIC. This resistance reflected traditional concerns about preserving local control of law enforcement, but also was refracted through the growing consciousness of civil liberties and privacy and heightened mistrust of the FBI that emerged during this period. Few states ultimately participated,

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not have the authority to decide which fingerprints submitted by law enforcement agencies should be returned" because "[s]uch a decision rests solely with the original contributor of fingerprints").

<sup>178</sup> COLE, *supra* note 134, at 217–24, 235–46.

<sup>179</sup> INT'L ASS'N OF CHIEFS OF POLICE, POLICE MGMT. & OPERATIONS DIVS., IDENTIFICATION WANTED: DEVELOPMENT OF THE AMERICAN CRIMINAL IDENTIFICATION SYSTEM, 1893–1943, at 169 (Donald C. Dilworth ed., 1977).

<sup>180</sup> Richman, *supra* note 42, at 385–86, 388–89 (noting that FBI's Identification Division "took care to play only a supporting role"); J. Edgar Hoover, *The Basis of Sound Law Enforcement*, 291 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 39–43 (1954); J. Edgar Hoover, *The National Division of Identification and Information*, 2 AM. J. POLICE SCI. 241, 247–48, 251 (1931). Privately, of course, the story was more complicated. See TIM WEINER, ENEMIES: A HISTORY OF THE FBI 73–90, 191–215, 230–52, 264–303 (2012); see also ATHAN G. THEOHARIS, THE FBI AND AMERICAN DEMOCRACY: A BRIEF CRITICAL HISTORY 1, 34–37, 42–43 (2004) (arguing that "[t]he FBI's creation and initial expansion were the by-product of a rejection of a states' rights tradition that held that law enforcement should be a local and state responsibility").

which eventually led to the establishment of the III index-pointer system, discussed above, as a means by which states could access each other's records without the need for a centralized FBI-maintained repository.<sup>181</sup>

However, the widening use of criminal history records for noncriminal purposes has created a new set of information control conflicts that are echoed in the conflicts over Secure Communities. Because state privacy laws governing criminal background checks for noncriminal purposes vary widely, conflicts between these laws invariably arise when background checks are conducted for noncriminal purposes using the III.<sup>182</sup> After many years of wrestling with the dilemma, an interstate compact was adopted in 1998, the National Crime Prevention and Privacy Compact, which resolves these conflicts by providing that the law of the state in which the background check has been requested governs, rather than the laws of the states owning and holding the records.<sup>183</sup> That approach requires states with more restrictive access laws to disclose their records for noncriminal background checks in other states under circumstances in which they would not do so within their own states. As James Jacobs and Tamara Crepet suggest, the reluctance to yield to other states under such circumstances may help to explain why many states have declined to ratify the Compact.<sup>184</sup>

Occasion for these intergovernmental conflicts over information control in interoperable database systems also arises in other areas.<sup>185</sup> For example, state and local public health authorities increasingly have been induced to collect and share personal information about a growing list of diseases and conditions by federal guidelines that encourage or condition funding upon information sharing. Once that information has been shared and stored, using federally maintained networks of interoperable databases, these agencies relinquish

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<sup>181</sup> OFFICE OF TECH. ASSESSMENT, ELECTRONIC RECORD SYSTEMS AND INDIVIDUAL PRIVACY 129–34 (1986); THEOHARIS, *supra* note 180, at 136–40; Doernberg & Zeigler, *supra* note 132, at 1120–21, 1130–42 (discussing initial reluctance of states to participate in NCIC criminal history file because it lacked safeguards concerning access and dissemination of records).

<sup>182</sup> COMPENDIUM OF STATE PRIVACY LEGISLATION, *supra* note 159, at 9–14; OFFICE OF TECH. ASSESSMENT, *supra* note 76, at 14, 17.

<sup>183</sup> National Crime Prevention and Privacy Compact, 42 U.S.C. § 14616 (2006). At the same time, the Compact also prohibits direct, unmediated electronic access to this network of interoperable criminal records databases by entities other than the FBI and state criminal history records repositories for “noncriminal justice purposes”—a term expressly defined to encompass “immigration and naturalization matters.” *Id.* arts. I(10), I(18), V(c).

<sup>184</sup> Jacobs & Crepet, *supra* note 77, at 207–08; OFFICE OF TECH. ASSESSMENT, THE FBI FINGERPRINT IDENTIFICATION AUTOMATION PROGRAM: ISSUES AND OPTIONS 11–12 (1991); Blake Harrison, *Sharing Criminal Records: Two New Interstate Compacts Enhance Public Safety by Improving the Exchange of Information*, ST. LEGISLATURES, Feb. 2003, at 26 (noting state legislators’ concerns that states “may lose control over their information” if they join the compact since “they cannot dictate how their information is used in other states”).

<sup>185</sup> Mikos, *supra* note 66.

control over secondary uses—which could occur much later or extend beyond the purposes contemplated when the data was collected and shared.<sup>186</sup> The proliferation of federal, state, and local DNA databases, which also are made interoperable through an FBI-maintained index-pointer system, presents opportunities for similar conflicts, as jurisdictions adopt different principles governing both collection of DNA samples and the broad range of uses to which those samples might be put.<sup>187</sup>

It is within this broader context that the intergovernmental conflicts over Secure Communities should be understood. As immigration enforcement initiatives rely further upon information sharing and database systems, the occasions for these kinds of information control conflicts will only increase, since the combination of interoperable systems and distributed collection, maintenance, access, and exchange of records among many different actors—and over extended periods of time—makes these systems, as Erin Murphy puts it, “the ultimate collaborative projects.”<sup>188</sup> Especially when information collected and shared for one purpose can be retained and used for other purposes much later, the possibilities for these conflicts multiply quickly.

#### D. *The Everyday Effects of Automated Immigration Policing*

Finally, these initiatives may significantly influence the day-to-day practices of police, immigration officials, and community members. The potential for these effects may be masked by what many regard as the most attractive feature of automated immigration policing: the routinized and ostensibly hidden manner in which they operate. The NCIC program, for example, is designed to send police immigration status information in response to routine queries that they otherwise would make in any event. Secure Communities is also deeply embedded within day-to-day policing since, as Peter Schuck describes, it “fits seamlessly into established booking routines” and “piggybacks on existing technology and databases” that police already use.<sup>189</sup> Seen in this light, the program neither changes law enforcement

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<sup>186</sup> Mariner, *supra* note 161, at 358, 371, 392–94; *see also* Sanja Zgonjanin, *No Child Left Behind Unrecruited*, 5 CONN. PUB. INT. L.J. 167, 180–82 (2006) (discussing Department of Defense’s use of personal data collected about high school students under the No Child Left Behind Act for military recruitment and marketing purposes).

<sup>187</sup> Murphy, *supra* note 127, at 827–28; Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 313, 333–36 (2010); Steinhardt, *supra* note 154; Goldstein, *supra* note 154.

<sup>188</sup> Murphy, *supra* note 127, at 824–25 (observing “database” can be a “misleadingly singular” term, given the “layers of individuals and objects” involved in their creation, operation, management, and access, often “span[ning] both geographical and temporal boundaries”); *see* MARX, *supra* note 18, at 210–11.

<sup>189</sup> Peter H. Schuck, *Three States Short of a Secure Community*, N.Y. TIMES, June 23, 2011, at A27.

operations nor imposes any costs or burdens upon them.<sup>190</sup> Because neither program confers state and local police with authority to make immigration status determinations or discretionary judgments about immigration enforcement priorities, it leaves those decisions in the hands of federal officials with immigration expertise that subfederal officials lack. And since Secure Communities automatically screens everyone who is arrested, it also purports to eliminate opportunities for those screening decisions to rest on discrimination or racial profiling.<sup>191</sup>

This picture of automated immigration policing is appealing, since it responds directly to concerns raised about both earlier federal programs such as 287(g) and unilateral state and local initiatives like S.B. 1070.<sup>192</sup> However, it also may be somewhat illusory. While they may appear seamless and hidden, both programs transform the basic nature of entire categories of police encounters—prearrest stops and other routine encounters in the case of the NCIC program, and criminal arrests in the case of Secure Communities—by infusing them with immigration-related meaning and potential consequences. Given the implementation of these programs on a universal, nationwide, and highly visible basis, the routinized monitoring of immigration status in these encounters has tremendous power to reshape the everyday practices of police officers, immigration officials, and community members alike—at minimum, as all surveillance does, by altering the power relationships between the monitors and the monitored, but also by prompting various forms of resistance and other types of everyday responses to those mechanisms.<sup>193</sup>

First, under these programs, routine police activities necessarily become moments that potentially lead to immigration policing and status determinations. The NCIC program, by revealing immigration status to police

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<sup>190</sup> *Id.*; Press Release, U.S. Immigration & Customs Enforcement, *Secure Communities: Setting the Record Straight* (Aug. 17, 2010), available at <http://www.nilc.org/document.html?id=245>; Ramlogan, *supra* note 108, at 4–5.

<sup>191</sup> Cox & Posner, *supra* note 124, at 1344–46; Chacón, *supra* note 7, at 616–17; see also Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 233–34 (2007) (exploring potential for automated surveillance to eliminate police discretion from traffic stops and thereby minimize racial profiling, discrimination, and pretextual enforcement).

<sup>192</sup> Verini, *supra* note 12; Schuck, *supra* note 189; see also *supra* Part II.

<sup>193</sup> Gary T. Marx, *A Tack in the Shoe: Neutralizing and Resisting the New Surveillance*, 59 J. SOC. ISSUES 369, 372–74 (2003) (advancing a typology of responses that surveillance can provoke); Torin Monahan & Rodolfo D. Torres, *Introduction*, in *SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* 1, 2 (Torin Monahan & Rodolfo D. Torres eds., 2010) (“[S]urveillance is not simply about monitoring or tracking individuals and their data—it is about the structuring of power relations through human, technical, or hybrid control mechanisms.”); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1953 (2013) (“Critically, the gathering of information affects the power dynamic between the watcher and the watched, giving the watcher greater power to influence or direct the subject of surveillance.”); see also Yofi Tirosh & Michael Birnhack, *Naked in Front of the Machine: Does Airport Scanning Violate Privacy?*, 74 OHIO ST. L.J. 1263 (2013).



officers making routine queries, enables the possibility of immigration-related arrests even in the absence of arrest authority, on a pretextual or improper basis. Even if no arrest is made, police officers who encounter individuals listed in the NCIC might take other actions based on that information, such as vehicle or individual searches.<sup>194</sup> While Secure Communities does not directly confer police with discretion to decide which arrestees are screened to ascertain their immigration status—since it encompasses all arrestees—it does create other significant opportunities for local jurisdictions to influence the patterns by which status determinations are conducted. As a threshold policy matter, jurisdictions have authority to establish their own criteria for both arrest and the categories of arrestees whose fingerprints are recorded and shared at the time of booking. Those arrest and booking policies vary widely among jurisdictions, especially for traffic violations, lower level offenses, and offenses arising from domestic violence.<sup>195</sup> As such, policy decisions about those arrest and booking practices effectively operate as policy decisions on immigration status screening as well, and variations among those policies present an obstacle to the program's goal of establishing nationwide uniformity in when status determinations occur.

Moreover, individual police officers have very broad discretion to decide whether individuals should be stopped or arrested, even on a discriminatory pretextual basis—as illustrated by the case of traffic stops—and efforts to cabin that discretion can be elusive.<sup>196</sup> And even as it precludes police from any direct immigration policing role after individuals have been arrested, Secure Communities empowers police, should they choose, to arrest individuals for the very purpose of booking them and having their immigration status screened—without regard to whether that arrest leads to any criminal prosecution. Evidence to date suggests that in some jurisdictions, this is precisely what has happened, as police officers have, for example, disproportionately “target[ed] Latinos for minor violations and pre-textual arrests with the actual goal of

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<sup>194</sup> Jacobs & Crepet, *supra* note 77, at 195–96 (suggesting that a police officer encountering an individual whose name is listed in NCIC's gang member file might be “more likely to conduct a search of [that] individual”); Harris, *supra* note 68, at 27–30 (discussing police use of NCIC in conducting routine law enforcement activities).

<sup>195</sup> See TASK FORCE ON SECURE COMMUNITIES, *supra* note 96, at 18; David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 255–56 (2008); Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185, 185–86, 203 (2012).

<sup>196</sup> See Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 427–28 (1997); LAFAYE, *supra* note 91, § 5.1(b); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 778–79, 802–04 (2012); Joh, *supra* note 191, at 204–11; see also Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 595 (1998).

initiating immigration checks through the Secure Communities system,” rather than for prosecution.<sup>197</sup>

On the other hand, that same discretion makes it at least conceivable that police concerned about potential *negative* immigration consequences for noncitizens being screened through Secure Communities could resist the program in the opposite direction by declining to make arrests or otherwise altering their arrest and booking processes in a more protective direction. Although concerns for potential public safety implications have apparently limited the extent to which jurisdictions are willing to entertain these options at the arrest stage, states and localities have increasingly resisted Secure Communities at later stages, as discussed below, by limiting their cooperation when ICE issues detainers.<sup>198</sup>

Second, these programs can influence how immigration officials prioritize their own enforcement decisions. At least conceivably, by consolidating decisions about which cases to prioritize with ICE officials, rather than state and local officials acting unilaterally or under 287(g) programs, Secure Communities could enable ICE to make better enforcement decisions that more closely reflect its stated priorities than when state and local officials make those determinations. To date, however, evidence instead indicates that as with those earlier initiatives, ICE has continued under Secure Communities to charge and deport large numbers of individuals with minor criminal histories or no criminal histories at all other than the arrests prompting their screening, which in many cases involve traffic violations or misdemeanors.<sup>199</sup>

This pattern of outcomes might reflect countervailing pressures on the agency to deport as many individuals as possible, without regard to its stated enforcement priorities, as members of Congress and other interest groups frequently urge. Indeed, internal documents suggest that senior ICE officials at times have established informal deportation quotas that have created pressures to disregard the agency’s articulated enforcement priorities.<sup>200</sup> By identifying an overwhelmingly large pool of potentially deportable individuals who fall outside of those priorities, Secure Communities may influence how officials choose to navigate that tension, pressuring them to act upon that information by

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<sup>197</sup> KOHLI ET AL., *supra* note 14, at 6.

<sup>198</sup> TASK FORCE ON SECURE COMMUNITIES, *supra* note 96, at 11–12, 16–23; see JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 101 (2001); Marx, *supra* note 193, at 383–84.

<sup>199</sup> TASK FORCE ON SECURE COMMUNITIES, *supra* note 96, at 11–12, 16–23; AGUILASOCHO ET AL., *supra* note 14, at 9–15; WASLIN, *supra* note 14, at 8–10; cf. Cox & Miles, *supra* note 12 (concluding that pattern by which ICE rolled out Secure Communities nationwide does not reflect stated enforcement priorities).

<sup>200</sup> Brad Heath, *Immigration Tactics Aimed at Boosting Deportations*, USA TODAY, Feb. 17, 2013, at A1; Seth Freed Wessler, *WTF, ICE? A Week’s Worth of Troubling Immigration Revelations*, COLORLINES (Feb. 22, 2013, 9:18 AM), <http://colorlines.com/archives/2013/02/five-troubling-immigration-revelations.html>.

pursuing enforcement actions even when individuals fall outside of the agency's priorities.

Finally, especially in light of these effects, automated immigration policing can prompt everyday community responses comparable to other forms of surveillance. For example, community groups have maintained that the New York Police Department's widespread surveillance since 2001 of day-to-day life in Muslim communities has undermined trust of the police within those communities.<sup>201</sup> As discussed above, earlier generations of immigration policing initiatives have prompted comparable responses in immigrant communities, and evidence to date suggests that Secure Communities has induced similar effects as well—for example, by making immigrant community members reluctant to report criminal activity as victims or witnesses. Police themselves have also expressed concern that Secure Communities may be undermining the relationships necessary for effective community policing, owing to the perception that contact with the police functions as a gateway to immigration authorities.<sup>202</sup>

All of these potential effects likely vary across different jurisdictions, and closer empirical examination would help illuminate the extent to which they operate, other factors at work, and whether policy changes might yield different outcomes. However, at least to date, evidence suggests that Secure Communities has effected basic shifts in the nature of ordinary, day-to-day policing by casting virtually *all* routine law enforcement activities at least potentially with immigration enforcement significance. The program has not simply replicated patterns akin to those yielded by its predecessors, but rather, given the nature and scale of the program's particular mechanisms, has amplified those patterns and propagated them nationwide.

## V. CONSTRAINING AUTOMATED IMMIGRATION POLICING AND THE IMMIGRATION SURVEILLANCE STATE

While critics have called for these automated immigration policing initiatives to be suspended or implemented more deliberately, the initiatives have been deployed swiftly—and with minimal transparency or public scrutiny—and over time are becoming deeply ingrained within the broader

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<sup>201</sup> DIALA SHAMAS, CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY (CLEAR) PROJECT, MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 32–38 (2013); Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. (forthcoming 2013) (manuscript at 146–64, 166–73), available at <http://ssrn.com/abstract=2282659>; see also MOUSTAFA BAYOUMI, HOW DOES IT FEEL TO BE A PROBLEM? BEING YOUNG AND ARAB IN AMERICA 1–2 (2008).

<sup>202</sup> TASK FORCE ON SECURE COMMUNITIES, *supra* note 96, at 11, 24–27; AGUILASOCHO ET AL., *supra* note 14, at 16–17; NIK THEODORE, DEP'T OF URBAN PLANNING & POLICY, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 5–9 (2013); WASLIN, *supra* note 14, at 12–13.

architecture of both immigration enforcement and criminal justice. A lawsuit challenging the government's authority to implement the NCIC program was dismissed for lack of standing in 2007.<sup>203</sup> And while strong opposition to Secure Communities persists, the program's technological systems have been activated nationwide and calls to suspend the program have fallen on deaf Obama Administration ears.<sup>204</sup> Legal and political challenges may yet effectively create roadblocks to slow the implementation of automated immigration policing programs.<sup>205</sup> But with these programs largely in place—and with further automation of immigration policing and other immigration enforcement practices on the horizon<sup>206</sup>—in this Part, I consider the principles and mechanisms that should constrain, inform, and guide their implementation and help limit the reach of the immigration surveillance state. First, I analyze the interests at stake in the collection, processing, and dissemination of immigration status and other personal information for immigration enforcement purposes. Second, I consider the possibility of harnessing conflicts over information control between federal and subfederal governments as a mechanism to protect those interests. Third, I highlight the importance of improving transparency, oversight, and accountability mechanisms when implementing these programs.

#### *A. Limits on Immigration-Related Data Collection and Information Sharing*

To begin with, automated immigration policing invites reassessment of the interests at stake when personal information is collected, maintained, processed, and disseminated for immigration enforcement purposes and the mechanisms to protect those interests.<sup>207</sup> As I have explored elsewhere, the proliferation of zones in society in which immigration enforcement takes place, and where immigration status has become visible, salient, and subject to pervasive

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<sup>203</sup> *Nat'l Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429, 445 (E.D.N.Y. 2007), *aff'd*, 283 F. App'x 848, 849 (2d Cir. 2008).

<sup>204</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS (2012), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf>.

<sup>205</sup> See *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 467 (4th Cir. 2013) (stating that there is a "good argument" that Congress has "not authorize[d] inclusion of civil immigration records in the NCIC database" system); *Doe v. Immigration & Customs Enforcement*, No. M-54(HB), 2006 WL 1294440, at \*1–3 (S.D.N.Y. May 10, 2006) (analyzing statutory text and legislative history and concluding that the government lacks authority to include civil immigration records in the NCIC database system); First Amended Complaint, *supra* note 101, ¶ 1 (challenging FBI's routine transmission of fingerprints to DHS under Secure Communities as violating the Privacy Act).

<sup>206</sup> See *supra* notes 117–120 and accompanying text; LYNCH, *supra* note 15, at 6–11; Kalhan, *supra* note 15, at 1157–68.

<sup>207</sup> See Solove, *supra* note 18, at 490–91.

monitoring, carries a range of social costs.<sup>208</sup> While it is entirely appropriate to collect, maintain, and disseminate personal information for immigration enforcement purposes in some contexts and subject to certain constraints, both individuals and society as a whole have legitimate interests in preserving zones in society in which immigration surveillance activities do not take place, and in making sure that when they do take place they are appropriately limited and constrained.

To some extent, those interests stem from the value of preserving individual anonymity or quasi-anonymity more generally and the individual harms that can result when immigration status is routinely monitored.<sup>209</sup> But they also arise from a broader set of social concerns that surveillance and information privacy scholars have increasingly recognized as important. These social interests—for example, preventing coercive or excessive aggregations of unrestrained government power—often have less to do with the particular information being collected in any given instance than with the harms that can arise from the means of surveillance and information management.<sup>210</sup> In the immigration enforcement context, the importance of constraining those aggregations of power is heightened by the particular vulnerabilities of noncitizens facing removal proceedings and the limited extent to which their interests are afforded meaningful protections in the immigration enforcement and removal process.<sup>211</sup>

Vindicating these interests in the immigration enforcement context therefore requires context-appropriate constraints on the collection, use, storage, and dissemination of personal information for immigration enforcement purposes, including limits on secondary uses of information that were not originally contemplated. While courts may seem unlikely to readily recognize and impose such limits, in fact the value of these kinds of limits has nevertheless long been recognized by numerous government actors—including courts and even federal immigration officials themselves.<sup>212</sup> However,

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<sup>208</sup> Kalhan, *supra* note 1; see Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559, 591–93 (1998).

<sup>209</sup> See Helen Nissenbaum, *The Meaning of Anonymity in an Information Age*, 15 INFO. SOC'Y 141, 144 (1999); A. Michael Froomkin, *Legal Issues in Anonymity and Pseudonymity*, 15 INFO. SOC'Y 113, 115–16 (1999). Cf. Tal Z. Zarsky & Norberto Nuno Gomes de Andrade, *Regulating Electronic Identity Intermediaries: The "Soft eID" Conundrum*, 74 OHIO ST. L.J. 1335 (2013).

<sup>210</sup> David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. (forthcoming 2013) (manuscript at 6–8), available at <http://ssrn.com/abstract=2228919>; SOLOVE, *supra* note 127, at 93–101; Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3, ¶¶ 58–70, <http://stlr.stanford.edu/pdf/freiwald-first-principles.pdf>; Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1099–1100 (2006); Schwartz & Treanor, *supra* note 168, at 2177.

<sup>211</sup> See *supra* notes 140–149 and accompanying text.

<sup>212</sup> Kalhan, *supra* note 1, at 1176–77, 1181–89, 1211–16; Linda Bosniak, *The Undocumented Immigrant: Contending Policy Approaches*, in DEBATING IMMIGRATION 85, 89–92 (Carol M. Swain ed., 2007). For a more recent example, see Thomas S. Winkowski, U.S. Customs & Border Protection & Daniel H. Ragsdale, U.S. Immigr. & Customs

exuberance over the potential benefits of interoperable databases and other new technologies may be clouding attention to the continued importance of these limits when implementing those systems. In an era in which more data is almost always assumed to be better, more information sharing and interconnectivity between database systems is also often assumed to be better as well.<sup>213</sup> But as John Palfrey and Urs Gasser have emphasized, “complete interoperability at all times and in all places . . . can introduce new vulnerabilities” and “exacerbate existing problems.” Accordingly, they argue, placing constraints upon information sharing and interoperability and retaining “friction in [the] system” may often be more optimal.<sup>214</sup>

Moreover, with advanced database systems, as Erin Murphy suggests, “to simply ignore that there is any special import to a database search” misapprehends both the potential benefits and harms of those systems and the broader implications of their use.<sup>215</sup> Outside the immigration context, both scholars and judges increasingly are acknowledging and engaging those implications. For example, in *United States v. Ellison*, the defendant sought suppression of evidence discovered in a search that was prompted by a police officer’s suspicionless NCIC query for the license plate number of the defendant’s vehicle.<sup>216</sup> While the Sixth Circuit upheld the denial of that suppression motion, Judge Karen Nelson Moore dissented, emphasizing that the nature of law enforcement databases invited careful consideration of whether some “measure of heightened suspicion or other constraint” should limit police access to information within them.<sup>217</sup> She cautioned that while an NCIC database search may seem only minimally intrusive, the “psychological invasion” from having personal information “subject to search by the police, for no reason, at any time one is driving a car is undoubtedly grave,” and that the

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Enforcement, *ICE–CBP Joint Message Regarding Hurricane Sandy*, U.S. DEP’T OF HOMELAND SEC. (Oct. 27, 2012), <http://www.dhs.gov/ice-cbp-joint-message-regarding-hurricane-sandy> (announcing that “there will be no immigration enforcement initiatives associated with evacuations or sheltering” related to Hurricane Sandy).

<sup>213</sup> Danielle Keats Citron & David Gray, *Addressing the Harm of Total Surveillance: A Reply to Professor Neil Richards*, 126 HARV. L. REV. F. 262, 262 (2013), [http://harvardlawreview.org/media/pdf/vol126\\_citron\\_\\_gray.pdf](http://harvardlawreview.org/media/pdf/vol126_citron__gray.pdf) (“The ethos of our age is ‘the more data, the better.’”).

<sup>214</sup> PALFREY & GASSER, *supra* note 131, at 75–76; *see also* Steven A. Bercu, *Toward Universal Surveillance in an Information Age Economy: Can We Handle Treasury’s New Police Technology?*, 34 JURIMETRICS J. 383, 448 (1994) (arguing that because electronic information sharing between different agencies “is silent, speedy, and nearly impossible to monitor, the focus should be on what information government can collect in the first place”); Peter P. Swire, *Privacy and Information Sharing in the War on Terrorism*, 51 VILL. L. REV. 951, 952 (2006) (proposing “due diligence checklist” for antiterrorism information sharing programs).

<sup>215</sup> Murphy, *supra* note 127, at 831.

<sup>216</sup> 462 F.3d 557, 559 (6th Cir. 2006).

<sup>217</sup> *Id.* at 567 (Moore, J., dissenting).

possibility of database errors might also justify suspicion or some other constraint on permitting police to access those databases.<sup>218</sup>

The specific legal or regulatory forms that such constraints upon immigration-related data collection, information sharing, and secondary uses might take are varied. As a matter of policy and institutional design, more constrained information collection, usage, and dissemination practices would better serve the full range of interests at stake in automated immigration policing. Such constraints could, for example, enable states and localities to choose whether or not their officers receive immigration records when making routine NCIC queries. Similarly, Secure Communities could be modified to enable states and localities to choose whether to share fingerprint records for immigration enforcement purposes, or even to refine the flow of fingerprint records from the FBI to DHS more generally—for example, by only enabling DHS to access FBI information in the context of specific, pending immigration-related decisions for which DHS needs that information. These approaches might help preserve space for states and localities to make voluntary choices about the level of immigration policing assistance they wish to provide, restoring some version of the equilibrium in immigration federalism that has been emerging in recent years and better respecting local control of law enforcement.

Other kinds of constraints on the collection, use, and dissemination of information may be warranted in these and other immigration enforcement contexts. By neglecting or minimizing the interests at stake in these practices, however, as implementation of automated immigration policing has so far, all of these possibilities fall off the table.

### B. *Immigration Federalism and Information Federalism*

One important means of fostering and facilitating these kinds of constraints—of creating “friction in [the] system” in aid of the public good—may be to harness the existing potential for conflicts over information control between the federal government and states and localities.<sup>219</sup> While it is customary, in immigration as in other areas, to think of the federal government as a “bulwark” against rights violations by states, federalism also establishes multiple centers of power with the capacity to exert independent checks upon federal authority. Particularly in the face of broad exercises of federal power, state and local institutions can play important roles in the protection of rights

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<sup>218</sup> *Id.* at 567–69; *see also* *Herring v. United States*, 555 U.S. 135, 155–56 (2009) (Ginsburg, J., dissenting); *Arizona v. Evans*, 514 U.S. 1, 17 (1995) (O’Connor, J., concurring); *id.* at 22–23 (Stevens, J., dissenting); *id.* at 26–29 (Ginsburg, J., dissenting); *United States v. Esquivel-Rios*, No. 12-3141, 2013 WL 3958372, at \*1–2, 4 (10th Cir. Aug. 2, 2003); Darlene Cedrés, *Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement*, 23 RUTGERS COMPUTER & TECH. L.J. 391, 401–02 (1997); Murphy, *supra* note 127.

<sup>219</sup> PALFREY & GASSER, *supra* note 131, at 75–76.

and liberties—as focal points for the expression of political opposition to national policies, as “seedbed[s] for political change at the national level,” as sources of alternative and potentially broader conceptions of federal rights, and as potentially moderating influences on the federal actors who seek their cooperation.<sup>220</sup>

Immigration scholars have long discounted these possibilities, devoting greater attention to more restrictive subfederal impulses. However, in recent years, scholars increasingly have recognized that states and localities can and do play affirmative and constructive roles in integrating, protecting, and otherwise affirmatively engaging their noncitizen residents.<sup>221</sup> Indeed, with respect to the collection, processing, storing, and dissemination of immigration status and other personal information for immigration enforcement purposes, states and localities have long played precisely this kind of role—for example, by fashioning policies that constrain the collection of that information or its dissemination to federal immigration officials.<sup>222</sup>

Automated immigration policing initiatives such as Secure Communities directly respond to these forms of resistance by reducing the need for affirmative state and local assistance in collecting information about potentially deportable noncitizens in their custody. However, as both surveillance and federalism scholars might have predicted, that resistance itself has persisted in the form of efforts to limit the ability of federal immigration officials to use that information.<sup>223</sup> A growing number of states and localities have adopted policies limiting their cooperation with ICE at the next stage of the enforcement process, when ICE issues detainers to facilitate apprehension of individuals identified through Secure Communities. For example, California recently adopted the Trust Act, which, except in cases involving individuals charged with or convicted of serious criminal offenses, prohibits law enforcement officials within the state from detaining individuals for immigration enforcement

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<sup>220</sup> Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1284–90 (2004); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1492–1519 (1987); Richman, *supra* note 42, at 418–21.

<sup>221</sup> Peter J. Spiro, *Formalizing Local Citizenship*, 37 FORDHAM URB. L.J. 559, 559 (2010); Elias, *supra* note 7; Kalhan, *supra* note 62, at 194–96, 201–02; Kalhan, *supra* note 70; Motomura, *supra* note 1, at 2075–79; Rodríguez, *supra* note 1; Schuck, *supra* note 67, at 59–67; Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 607–10 (2004); Miriam J. Wells, *The Grassroots Reconfiguration of U.S. Immigration Policy*, 38 INT’L MIGRATION REV. 1308, 1308 (2004).

<sup>222</sup> Kalhan, *supra* note 1, at 1211–16; Eagly, *supra* note 9, at 1157–70; Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 248–49 (2012); Huyen Pham, *The Constitutional Right Not to Cooperate?: Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1374–75 (2006).

<sup>223</sup> Marx, *supra* note 193; Bulman-Pozen & Gerken, *supra* note 35, at 1259; *cf.* Gerken, *supra* note 34, at 1746–52, 1759.



purposes, at ICE's request, if those individuals are otherwise eligible for release.<sup>224</sup>

The significance of these anti-detainer policies and the extent to which they take hold in other jurisdictions remain to be seen. However, the broader trajectory leading to their adoption suggests that as state and local institutions—including hospitals, educational institutions, and others—increasingly collect and maintain personal information that might be relevant to immigration enforcement, analysis of immigration federalism may benefit from greater understanding of and attention to the dynamics of information control. Moreover, like the fingerprints collected through Secure Communities, the information sought by federal immigration authorities to identify potentially deportable individuals need not even directly include immigration status itself. As databases become increasingly interoperable and capable of aggregating information from a variety of different sources, federal officials may well regard other forms of personal information—whether or not personally identifiable—as amply sufficient to serve their immigration enforcement purposes.<sup>225</sup> Accordingly, while states and localities may still find that restrictions on collection and dissemination of immigration status information play an important and useful role, they also will likely find those limitations insufficient to fully achieve the immigration-protective objectives they have sought to advance with those laws.

Beyond immigration, these episodes raise the question of whether conflicts over information control might be harnessed to help protect social interests in privacy and constrain federal surveillance activities. Scholars have critically assessed the potential for states and localities to protect privacy interests as regulators.<sup>226</sup> Separately, scholars have also assessed the prospects for aligning the interests of companies collecting personal information with interests in privacy.<sup>227</sup> Since, as discussed above, states and localities increasingly possess

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<sup>224</sup> Patrick McGreevy, *Brown Resets Bar on Migrant Rights*, L.A. TIMES, Oct. 6, 2013, at A1; Elise Foley & Roque Planas, *Trust Act Signed in California to Limit Deportation Program*, HUFFINGTON POST (Oct. 5, 2013), <http://huff.to/192nrO6>; see also Lasch, *supra* note 51, at 288–90; Cheh, *supra* note 114; Kalhan, *supra* note 70.

<sup>225</sup> Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1836–48 (2011) (discussing limitations of conventional distinctions between personally identifiable information and non-personally identifiable information); Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1716–27 (2010) (discussing techniques used to identify individuals from combinations of non-personally identifiable information).

<sup>226</sup> See Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. CIRCUIT 57, 64–71 (2013), [http://www.californialawreview.org/assets/circuit/Kaminski\\_4\\_57.pdf](http://www.californialawreview.org/assets/circuit/Kaminski_4_57.pdf); Patricia L. Bellia, *Federalization in Information Privacy Law*, 118 YALE L.J. 868, 871 (2009); Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 916–18 (2009).

<sup>227</sup> SOLOVE, *supra* note 127, at 101–04 (proposing that “companies collecting and using [individuals’] personal information” should be deemed to “stand in a fiduciary relationship

large volumes of information that federal authorities seek for their own surveillance and enforcement purposes, the institutional role of states and localities as holders of this information warrants critical examination as well. For example, Robert Mikos has recently argued that under prevailing understandings of Tenth Amendment principles, federal efforts to compel states to provide this information should be foreclosed as an impermissible form of commandeering.<sup>228</sup> While anti-commandeering doctrine itself has limits, as Mikos acknowledges, his analysis points to the possibility of information federalism as a constraint on federal surveillance, whether as a matter of constitutional doctrine, legislation, or technological design.<sup>229</sup>

### *C. Enhancing Transparency, Oversight, and Accountability*

Finally, automated immigration enforcement initiatives demand greater attention to transparency, oversight, and accountability. Whether programmatically or in the context of individual adjudications, immigration enforcement agencies, although improving in some ways, have long suffered from major transparency and accountability deficits.<sup>230</sup> As the “opt-out” controversies over Secure Communities reveal, those deficits have been amply in evidence with automated immigration policing initiatives. Agency officials have been widely criticized not simply for failing to explain the program, but for affirmatively providing inaccurate, incomplete, and misleading information about the program’s operations and legal basis. Although DHS officials have acknowledged those missteps and endeavored to improve their public outreach, much of what is known about Secure Communities has only come from documents released in litigation under the Freedom of Information Act, rather than from affirmative disclosures by DHS.<sup>231</sup>

But these transparency problems go well beyond the failure of federal officials to affirmatively disclose information about these programs. An additional major contributing factor has been the lack of sufficiently concrete or detailed legal authority to support such major and complicated initiatives. The main statutes upon which federal authorities have relied to implement these programs provide only vague and general support for these initiatives, with one having been enacted in 1930 to provide general authority for the FBI’s maintenance of identification and criminal history records and the other having been adopted in the wake of the 2001 terrorist attacks to enable immigration

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with” those individuals); Soghoian, *supra* note 157, at 36–40 (observing that law enforcement agencies tend to make more tailored requests for information when telecommunications carriers and Internet service providers charge those agencies with fees to conduct surveillance on their customers and users).

<sup>228</sup> Mikos, *supra* note 66, at 105–09.

<sup>229</sup> See *id.*; see also Richman, *supra* note 42, at 418–21.

<sup>230</sup> Sklansky, *supra* note 9, at 212–21; Chacón, *supra* note 57; Serena Hoy, *The Other Detainees*, LEGAL AFF., Sept.–Oct. 2004, at 58.

<sup>231</sup> Tokar, *supra* note 106, at 103–06.

officials to access information in federal intelligence and law enforcement databases that may be relevant when issuing visas or making admissibility or deportability determinations.<sup>232</sup> Indeed, as early as the 1970s, observers urged Congress to adopt more detailed framework legislation to govern the FBI's increasingly sprawling information services, arguing that the existing statute was insufficient to "cope with new computerized information systems, much less a system which spans the entire nation and contains, potentially at least, all the criminal justice information held in files anywhere."<sup>233</sup> While Congress failed to adopt such legislation, the FBI did at least issue regulations and established an advisory board in the 1970s to oversee the operation of these systems. With Secure Communities, the lack of clear and specific statutory authority is exacerbated by the lack of regulations to govern the program's operations.<sup>234</sup> Whether coming from Congress, federal agencies, or both acting together, accountability and oversight of automated immigration policing would be better served by a more detailed, coherent legal framework and opportunities for greater public engagement with those rules. As the Markle Foundation—which has championed greater information sharing in the aftermath of the 2001 terrorist attacks—has emphasized in the context of information sharing for national security purposes, new information sharing initiatives demand privacy and security protections that "address the hard questions [such as secondary use and redress] . . . as opposed to existing policies that state that agencies must comply with the law without providing guidance on how to do so."<sup>235</sup> These observations hold equally true for automated immigration policing programs, and will only become more relevant as immigration authorities continue to incorporate technology-based systems into their enforcement practices.

Because of the necessarily opaque manner in which database systems and automated decisionmaking mechanisms often function—and the ways in which multiple actors over time are involved in their operation—oversight of these systems can be difficult in the context of individual adjudications.<sup>236</sup> This is undoubtedly more true in the immigration enforcement system, which is ill-equipped to supervise investigatory practices to begin with.<sup>237</sup> To be sure, individual opportunities to redress harms arising from automated immigration

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<sup>232</sup> 8 U.S.C. § 1722 (2012); 28 U.S.C. § 534 (2006); see Wishnie, *supra* note 21; *supra* notes 108–110 and accompanying text.

<sup>233</sup> Doernberg & Zeigler, *supra* note 132, at 1134–42.

<sup>234</sup> Marcella Coyne, *You're Hot and Then You're Cold: Why ICE Should Allow States to Comment on Secure Communities*, 65 ADMIN. L. REV. 155, 157–58 (2013).

<sup>235</sup> ZOE BAIRD BUDINGER & JEFFREY H. SMITH, MARKLE FOUND., TEN YEARS AFTER 9/11: A STATUS REPORT ON INFORMATION SHARING 7 (2011) (urging the federal government also to "find ways to publically discuss the legal authorities associated with data collection, sharing, and use . . . in order to ensure public trust in the policies and adequate oversight"); see Balkin, *supra* note 18, at 21.

<sup>236</sup> Murphy, *supra* note 127, at 826–29, 831–32; see Frank Pasquale, *Restoring Transparency to Automated Authority*, 9 J. TELECOM. & HIGH TECH. L. 235, 235–39, 250–54 (2011).

<sup>237</sup> See Chacón, *supra* note 57, at 1603–19.

policing, whether administrative or judicial in nature, can still play an important role—not only in remedying those individual harms, but also in creating incentives for DHS, the FBI, and other actors to ensure that information maintained in their database systems is accurate and complete.<sup>238</sup> But given limitations in the ability of these individual redress mechanisms to ensure proper oversight of database systems, these systems raise the stakes in making sure that structural oversight mechanisms operate effectively.<sup>239</sup> Especially as criminal justice and immigration enforcement converge, the blurred lines of accountability among different institutions make accountability difficult; the implementation of automated immigration policing initiatives only blurs those lines further.<sup>240</sup>

## VI. CONCLUSION

As policymakers increasingly implement new technologies to assist with immigration control, the technology-, surveillance-, and privacy-related questions arising from these initiatives warrant careful consideration at the earliest possible moments, since both politically and logistically, it can be difficult to constrain access to large and complex networks of databases once they have been implemented and made widely accessible.<sup>241</sup> As Peter Swire and Lauren Steinfeld therefore argue, in the context of public health surveillance and information sharing, “the protection of privacy and security is often best done together,” at the time that new surveillance technologies are initially deployed.<sup>242</sup> While becoming more deeply engrained, automated immigration policing and other immigration surveillance initiatives may nevertheless be at a sufficiently nascent stage for these values and interests to be accommodated as new technologies continue to be deployed and implemented. Such questions also are illustrative of those arising in other policy domains—including education, public health, and others—where database systems and surveillance technologies are reconfiguring federalism.

The stakes involved in the implementation of these systems go beyond the particularities of the technologies themselves. Ultimately, automated immigration policing initiatives—like technology-based surveillance in other

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<sup>238</sup> See *Herring v. United States*, 555 U.S. 135, 148–57 (2009) (Ginsburg, J., dissenting); *Arizona v. Evans*, 514 U.S. 1, 22–23 (1995) (Stevens, J., dissenting).

<sup>239</sup> Citron & Pasquale, *supra* note 156, at 1470–93 (proposing mechanisms of “network accountability” as means of ensuring proper oversight of fusion centers); Murphy, *supra* note 127, at 826–29 (emphasizing importance of “structural oversight” to ensure the integrity and proper use of database systems).

<sup>240</sup> Sklansky, *supra* note 9, at 212–21.

<sup>241</sup> Jacobs & Crepet, *supra* note 77, at 211–12 (casting doubt on prospect of “reining in” widespread access to criminal records databases).

<sup>242</sup> Peter P. Swire & Lauren B. Steinfeld, *Security and Privacy After September 11: The Health Care Example*, 86 MINN. L. REV. 1515, 1539 (2002); see Swire, *supra* note 214, at 952 (proposing a “due diligence checklist” to be consulted before information sharing initiatives are implemented).

contexts—aspire to achieve a certain kind of “immigration enforcement perfection,” by attempting to make immigration status determinations effectively universal and immigration law violations effectively impossible to avoid identification.<sup>243</sup> As I have explained, however, that quest for perfection is not only illusory, but also carries significant costs. Especially as automation more tightly integrates the institutions and mechanisms of immigration enforcement with those of other policy domains, scholars, policymakers, and advocates across a range of substantive areas stand to benefit from addressing the implications of that reconfiguration, and the potential for these hazards, more closely.

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<sup>243</sup> See generally Michael L. Rich, *Should We Make Crime Impossible?*, 36 HARV. J.L. & PUB. POL’Y 795 (2013) (discussing and critically assessing attempts to use new technologies to “make crime impossible”).

